In The Supreme Court of the United States

OCTOBER TERM, 1946

No. 770

THE CITY OF PORTLAND, A MUNICIPAL CORPORATION,
Petitioner, Appellant and Cross-Respondent below,
v.
PUBLIC MARKET COMPANY OF PORTLAND,
Respondent and Cross-Appellant below,
and
RECONSTRUCTION FINANCE CORPORATION AND THE FIRST NATIONAL BANK OF PORTLAND (OREGON),
Respondents and Cross-Appellants below.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON AND BRIEF IN SUPPORT THEREOF

JAY BOWERMAN,
LYMAN E. LATOURETTE,
MARIAN C. RUSHING,
Attorneys for Petitioner
(Defendant-Appellant below).
HART, SPENCER, McCULLOCH & ROCKWOOD,
COOKINGHAM & HANLEY,
Attorneys for Plaintiff-Respondent below.
GEORGE R. WILBUR,
EDGAR FREED,
Attorneys for Defendants-Respondents below.

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The omission in this petition and brief of record page numbers is unavoidable because none of the record other than abstracts of pleadings and the decrees were printed when the case came before the Supreme Court of Oregon and the record is so extensive that it could not be prepared and printed within the time available. Permission is requested to have the page numbers, which petitioner's counsel will supply after the Record is made up and printed, inserted subsequently.

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To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is a suit in equity brought in the Circuit Court for Multnomah County, Oregon, by respondent, Public Market Company of Portland, herein, against the City of Portland,

petitioner, Reconstruction Finance Corporation, and The First National Bank of Portland (Oregon), for an accounting and specific performance of a contract for the purchase by the City of certain property, and an accounting with Reconstruction Finance Corporation and said Bank concerning the amount due on a mortgage against the property, and a decree for a release, if paid. The case was tried by the court without a jury and resulted in a judgment entered August 1, 1944, against the City allowing the Company damages in the sum of $791,666.67,—to inure to the benefit of the Bank, trustee for RFC. (R .... and ....).

An appeal was taken by the City to the Supreme Court of Oregon which increased the amount of damages by the sum of $163,943.96, making $663,943.96, plus interest at 6 per cent per annum, thus making a total as of September 17, 1946 (date of entering the mandate in the lower court) $1,135,676.07. (R .... and .....).

For brevity we will here refer to the petitioner as the City, the Public Market Company of Portland as the Company, Reconstruction Finance Corporation as RFC and The First National Bank of Portland (Oregon) as the Bank. All of the parties are corporations.

The principal questions involved on the appeal were: (1) whether the law of the case was established by a previous decision of the Supreme Court as a result of which the case would be treated as converted from a suit in equity

for a specific performance of the contract to an action for damages, as in tort, fixing the liability of the City and the measure of damages, without any allegations having been made concerning the supposed acts of negligence or the amount of damages proximately resulting therefrom, without having given the City leave to deny such allegations and show, if it could, that the failure of the Company to receive payment was because of its own acts which prevented the City from issuing revenue bonds (called utility certificates under the City's charter) by which payment was intended to have been made, and prevented the City from selling the certificates, if they could have been issued, it being claimed on behalf of the City that a conversion of the case, under these circumstances, to one in tort in place of one on contract was a violation of the 14th Amendment to the Federal Constitution because the City was denied its day in court and due process of law with respect to such new cause of action; (2) whether the previous opinion of the Supreme Court could be fairly interpreted as intending such result; (3) whether the Supreme Court, being only a court of review in matters like this, had jurisdiction or authority, after finding that specific performance could not be decreed, to go beyond the matter litigated in the court below, treat the case as one to recover damages for supposed negligence, find the City guilty of negligence, and declare the measure of damages therefor, all being void, as claimed by the City, because in violation of said constitutional provision and in

violation of the Oregon law fixing the courts' jurisdiction; (4) whether or not the true measure of damages (if negligence on the part of the City rather than negligence on the part of the Company be assumed as the proximate cause of damages and if a court of equity rather than a court of law be assumed as being the proper forum for trial) should not have been based upon the amount for which the certificates could have been sold rather than upon the contract price, thus confining the recovery of damages to the amount by which the result of sale (up to the contract price) would exceed the value of the property retained by the Company; (5) whether, as the result of the accounting, the contract price should be fairly claimed to be more than $1,268,793.11 in place of $1,463,943.96 as found by the Court, (and this involved minor questions concerning several items in the accounting), and (6) whether or not the value of the property as of the time when title papers were rejected as above stated was not fully as much as the contract price. (See opinion in Public Market Co. of Portland v. City of Portland, et al, 42 Or. Adv. Sheets, 873-903; 170 P. (2d) 586).

The previous decision above referred to is in 171 Or. 522; 130 P. (2d) 624; 138 P. (2d) 916, and another decision yet before that may be found in 160 Or. 155; 82 P. (2d) 440.

In order to make a fair presentation of the matter as it

now comes to this Court for relief under the 14th Amendment we will here give a brief historical statement.

The contract is dated October 28, 1931. The City at that time, and previously, owned market booths which had been constructed in street area (SW Yamhill Street between Second and Fifth Avenues) and which were used for conducting a public market whereby the public could purchase food directly from the producers. This market was known as the Carroll Public Market. While the City was seeking to have this market removed from the street because of traffic congestion, the Company acquired property adjoining the foot of the street (between Front Avenue and the River), investigated its suitability for a public market operation under private ownership, obtained from the City Council a vacation of certain street area, cleared old buildings from the area, prepared building plans and took preliminary steps for construction. (R ..... and .....). It then halted further work because of discussion favoring an off-street market in the vicinity under City ownership. (R .....). As a result the contract above mentioned was signed whereby the Company agreed to provide the land, erect a building, obtain and install equipment, material, supplies and lessees, and establish a market for the City at a price of $1,244,790.60 for land and building, plus the cost of equipment, materials and supplies, and 10 per cent for purchase and installation, and plus 10 per cent of

one year's rent as compensation for negotiating leases, etc. (R .....).

In the first paragraph of the contract the Company agreed that within fifteen days after the City procured an approving opinion of legal counsel concerning its authority to "issue and sell the public market utility certificates authorized by Ordinance No. 61192" it (the Company) would resume active construction of a market building on the land mentioned in the contract. (R .....).

The ordinance here referred to begins with the statement: "To provide funds for the purpose of purchasing and establishing a public market as a public utility, public market utility certificates shall be issued by the City * * *" in an amount not exceeding $2,500,000.00. Subsequent provisions specify the form of the certificates and of the coupons, all to be secured by a trust mortgage constituting "a first lien against the land, building * * * and the net revenues * * *" such certificates not to be general obligations of the City but to be paid only from the net revenues of the property, and the certificates to be "advertised and sold to the highest responsible bidder for cash, the Council reserving the right to reject any and all bids tendered therefor." (R ..... and .....).

The contract provisions for conveying the property to the City are in paragraphs 3, 6 and 8 which, in part are:

(3) "The Company agrees that upon the completion of said public market building and the purchase and installation therein of the equipment, materials and supplies described in said Exhibit "A", and as first approved by the Council, it will convey to the City by warranty deed (and by bill of sale with relation to movable fixtures and personal property) good and marketable title to the following described property. * * *" (R .....).

(6) "Upon the completion by the Company of its obligations under this agreement, and at the time of the tender by the Company to the City of proper conveyances of said property and assignments of its leases, contracts and insurance policies affecting said premises, the City shall accept said conveyances and said assignments and shall pay to the Company the sum of $1,244,790.66; and as of the date of said conveyances and assignments and of the making of said payment by the City to the Company, there shall be an accounting * * *. *All payments due from the City to the Company hereunder, if unpaid to the Company when due, shall thereafter bear interest at the rate of six per cent (6%) per annum, payable quarter annually.*" (R .....).

(8) "From the date of the execution and delivery of this agreement until completion of its other obligations herein set forth, the Company agrees that it will perform leasing service for the procuring of tenants for said public market building, the identity of such tenants and the terms and conditions of their tenancy to be subject to the approval of the City through its Council, *and agrees that before the City acquires said public market building it shall be so occupied as to be a going public market utility.* * * *" (R .....).

The above provisions as well as the provisions referring to Ordinance No. 61192 concerning the issuance and sale of utility certificates eventually brought about controversy and litigation which terminated, in so far as the state courts are concerned, with the judgment or decree above mentioned after the case had been converted from a suit for specific performance of the contract to a case for damages as in tort without allegations specifying acts of negligence, and damages proximately resulting therefrom.

Other provisions of the contract which concern the purchase of equipment, materials and supplies, the making of leases, adding extras in the building during construction, etc., without Council approval also involved some controversy, in so far as these features added to the "contract price". No further mention need be made of them at this time.

The building construction did not go forward until the Company, early in 1933, obtained a loan from RFC on the basis of bonds representing $775,000.00 (discounted 6½%, making the result $724,625). (R .....). On December 15, 1933, the building was sufficiently completed for use, the Company had obtained equipment, materials, supplies and lessees and on that date began operating the property as a public market utility, without giving the City possession or offering any conveyance whereby the City might make a mortgage and issue utility certificates as provided by Ordi-

nance No. 61192 until November 9, 1934, when the Company, having concluded that the contract in reality created a general obligation on the City to pay in cash (whether or not utility certificates could be sold as provided by the ordinance) made a so-called tender of title papers. The City Council on November 14th rejected the "tender" by adopting a motion which recited that the City "recognizes no duty upon its part to comply with any terms of any alleged agreement between it and the Public Market Company and particularly with reference to that document dated October 28, 1931. * * *." (Book of Ex. pp. 299 and 230). The City Council by using the term "alleged contract" plainly had reference to the contract as a general obligation, which the Company was then claiming it to be. Nevertheless, the Company, and afterwards the court, refers to this as a repudiation of the contract. (R p. ..... and .....).

During the eleven months which elapsed between the time the market was opened and the time of the so-called tender to the City a great deal happened,—high salaries of officers, poor management, friction with lessees and stall renters, operating losses amounting to $11,000.00 per month, failure to submit proper data to the City Council for its approval of leases, purchases of equipment, building changes, etc., all of which tended to make a sale of certificates as proposed impossible during a financial depression

as then prevailed, and difficult in prosperous times. (R....).

The Company, shortly after the City's refusal of the alleged tender, entered suit against the City for an accounting and for specific performance of the contract on the theory that the City had assumed a general obligation. The case came to grips upon a demurrer to the second amended complaint for want of sufficient facts to support a suit in equity for specific performance. The Company, in the complaint and subsequent argument, took the position that the contract which was fully set out in the complaint created a general obligation on the City. The City opposed this, maintaining that payment was to be made only from a special fund which might be created in the manner provided by Ordinance No. 61192 above mentioned and that the complaint failed to show that this fund had been or could be created at the time of the alleged tender. The Court sustained the demurrer, and, no further amendment being offered, entered a decree dismissing the case. On appeal the Supreme Court of Oregon reversed the action of the Circurt Court, holding that the contract, as shown by the complaint created a general obligation on the City. (See 160 Or. 155; 82 P. (2d) 440.)

The City then, pursuant to leave of court, filed an answer admitting the contract but denying that it created a general obligation or that the Company had fully performed. By

further and separate answer the City alleged facts showing, that it had no funds for the purchase of a market property such as that proposed by the Company, no sufficient power of taxation to raise the money and no power to incur an indebtedness without an approving vote of the people; that the contract was drawn with the purpose of making the obligation of the City payable by utility certificates as authorized by the City charter and provided by Ordinance No. 61192 mentioned in the contract; that the parties at and prior to the time of signing the contract agreed upon this method of payment; that the Company's officers subsequently confirmed this understanding and that the contract would be void if construed as a general obligation. (R .....). In consequence of this, the City prayed that the contract be construed as creating no general obligation to pay, but, if construed as creating a general obligation, it be reformed in accordance with the agreement. The City further alleged that the utility certificates were not marketable and the City had no other means of obtaining funds for paying in the event of a decree of specific performance. The Company, RFC and the Bank severally denied for the most part the affirmative allegations of the City. (R .....).

The case came to trial before the Honorable Fred W. Wilson, Circuit Judge for the County of Wasco, who was assigned to Multnomah County to hear and determine the

case. It was stipulated that the accounting matter be postponed until after a trial and determination of the issue concerning the nature of the City's obligation. Much evidence and many exhibits were then presented showing in great detail the negotiations and discussions between the parties prior to the time of drafting the contract, the details of the drafting, the discussion which occurred at a public meeting between the contracting parties and others concerning the wording of the contract and its sufficiency to protect the taxpayers by providing that payment by the City could be only from a special fund, the statements of Company officers and City officers that the contract was so drawn, subsequent statements by the Company's officers to the same effect, the Whitbeck litigation, the City's indebtedness, its limited taxing power, non-salability of certificates as proposed, and other matters, all tending to show that the contract should not be treated as a general obligation; that the Company had failed to create a "going public market utility" within the meaning of the contract and therefore specific performance should not be decreed. (Book of Exhibits, pp. 1-416 and 171 Or. 522; 138 P. (2d) 916).

Judge Wilson, after briefs and argument were submitted, found that the contract created no general obligation on the City, and that the property was not a going public market within the meaning of the contract. (R.....). The Company, failing to further amend its complaint and

having made no claim that the City should be required to issue and sell utility certificates in order to raise such amount as might thus be provided, a decree was entered dismissing the case. (R .....).

The Company appealed to the Supreme Court which held, from the evidence received by Judge Wilson, that the contract should be construed as creating no general obligation on the City to pay; that the Company had fully performed its obligations under the contract and that the court should determine what relief should be granted to the Company. The opinion of the Supreme Court then proceeds to state that the Company should obtain relief on the theory advanced by it and that the measure of relief should be the same as in local improvement cases except that, inasmuch as payment could not be made by a decree requiring the City to sell utility certificates, the damages should be the contract price less the value of the property at the time the City refused the "tender" and that additional damages should be allowed by way of interest from the date of such refusal. The opinion further provided that the case be remanded to the lower court which should give leave to amend the pleadings, take evidence and then determine the contract price and the value of the property at the time the City rejected the "tender". (R .....; 171 Or. 522; 130 P. (2d) 624.)

After entry of the mandate in the Circuit Court the Com-

pany, taking the view that everything said by the Supreme Court was law of the case, filed a third amended complaint which incorporates all of the allegations of the second amended complaint and adds allegations to the effect that the City took no steps to create the special fund for payment; that on November 14, 1934, the Council adopted the motion above mentioned; that the City has since said date refused continuously to perform or to recognize any obligation under said contract; that the value of the property on that date was not more than $550,000.00, and that, if specific performance is not available, the Company would suffer damage, "by reason of said breach and repudiation of contract", in a sum equal to the total amount payable under the contract less the value of the property remaining in its possession on said date, and that the Company had no plain, speedy or adequate remedy at law or otherwise than in a court of equity. In the prayer a fifth paragraph is inserted to the effect that, if specific performance be not available, the Company have judgment for the total amount found due upon an accounting less such sum as shall be found to be the value of the property tendered at the time of refusal with interest at six per cent per annum from November 14, 1934. (R .....).

The City, taking the view that the portion of the opinion by the Supreme Court which referred to the Company's remedy, the liability of the City, and the measure of dam-

ages, was suggestive rather than an adjudication, but, if intended as an adjudication, it was void because it was beyond the jurisdiction of the court and in violation of the 14th Amendment of the federal Constitution, filed an answer which, aside from incorporating by reference the answer previously filed (R .....) concerning the case as one for specific performance, denied the new allegations (except the motion passed by the Council), and then set up further and separate defenses to the effect, (1) that the value of the property on November 14, 1934 was in excess of the amount payable under the contract; (2) that the utility certificates provided for by Ordinance No. 61192 were not at any time after October 31, 1931, readily salable at any price and could not in any event bring a price in excess of 30 cents on the dollar; that the Company operated the market property from December 15, 1933, to November 14, 1934, and thereafter as a public market but so negligently and incompetently operated as to sustain substantial losses on account of which, together with the condition of the bond market, the certificates could not have been sold on November 14, 1934 or at any date thereafter for a price in excess of 20 cents on the dollar; that the City had previously had no occasion to set these matters up as a defense against the Company's previous claims, and if not permitted to set them up in answer to the third amended complaint the 14th Amendment of the Federal Constitution would be violated and the City's privilege would be abridged and it

would be denied equal protection of the laws and deprived of property without due process of law; (3) that the Company in its alleged tender demanded that the City pay in cash a sum in excess of $1,250,000.00 irrespective of any price that could be realized by a sale of utility certificates provided for by Ordinance No. 61192 as the source for paying the Company, and the Company thereafter breached its contract with the City and excused the City from further performance (and here allegations concerning the City's constitutional rights were also included); (4) that the Company prevented the City from selling the utility certificates by certain negligent acts, in consequence of which inefficiency, heavy and unnecessary expense and loss followed when there should have been a profit, and (5) that the Company, in a certain case in said court between it and the City which concerned a taking of a small strip of land, unoccupied by the building, for a street widening, set up as its damages for such taking that the full value of said premises, a part of which was being taken, was in excess of $2,300,000.00, and that said street widening caused a complete loss of said premises to the Company, and, in said answer, it is alleged that the Company was therefor estopped from asserting a smaller value as of November 14, 1934. (R .....).

In each of the third, fourth and fifth further defenses

the allegations concerning the City's constitutional rights are embraced as in the second.

RFC and the Bank filed answers and cross-complaints containing allegations similar to those set up in the Company's third amended complaint, except that the prayer was for a payment to the Bank for RFC from the amount of recovery made by the Company against the City, of an amount sufficient to discharge its mortgage. Replies were filed by the Company, RFC and the Bank against the City's further and separate answers and defenses denying substantially all of the allegations. (R .....).

The case then came on for trial before the Honorable James W. Crawford, Judge of the Circuit Court for Multnomah County. A question soon arose concerning the scope of the inquiry. The court ruled in accordance with the Company's theory that everything said in the previous opinion of the Supreme Court became the law of the case and that the City was therefore barred from presenting any evidence in support of any of the allegations contained in its further and separate answers and defenses but that the City would be permitted under the equity rule to introduce evidence concerning these matters although such evidence would be entitled to no consideration. (R.....
.....)

As the trial of the case unfolded concerning the value of the property as of November 14, 1934, testimony was

produced by the Company to the effect that the building, equipment, etc., were not adapted to a use other than for operating a public market; that the market operation proved to be unsuccessful, in consequence of which the property was left on the Company's hands without value except a salvage value of $400,000.00 to $500,000.00 (R .....). The City's expert witnesses on value held to the opinion that the Company took when it was negotiating the contract with the City, viz., that the location was suitable; that the building, equipment, etc., as planned were likewise suitable and that a market operation there should be successful, in consequence of which the property on November 14, 1934, had a value approaching its cost (the amount of the contract) except that this value was somewhat impaired by lack of reasonable diligence on the part of the Company in handling and operating the market. Five expert witnesses on value testified to this effect. (R .....). Two other men who were experts in handling and managing large food markets, although not testifying as to the value of the property, testified that the entire property as planned and placed in operation was suitable for a food market operation of the type planned and would have been successful by the application of experienced management and operation. R .....). This evidence went in without special objection in so far as it might be considered as bearing on the value of the property but not as in support of the further and separate answers above mentioned.

Two other witnesses who were experts in the line of selling securities including certificates of the type provided for by Ordinance No. 61192 were called by the City. Objection was raised against their testimony concerning the non-salability of the certificates on or at any time near November 14, 1934. The objection was sustained on the ground above stated, viz., that the scope of inquiry necessitated the exclusion of such evidence. (R .....). Nevertheless, they were permitted to testify under the equity rule and on the basis above stated. Their testimony showed that the certificates, if the entire amount of $2,500,000.00 had been secured by a mortgage on the property as proposed and offered for sale, would not have brought in excess of $750,000.00 in view of losses experienced by the Company's operation and the poor market for such securities at the time. (R .....).

Much other evidence was offered showing numerous acts of neglect on the part of the Company during its possession and operation of the market through the eleven months' period prior to November 14, 1934, and also afterwards, which had a depressing effect upon the success of the market operation and the salability of the certificates. This evidence also was excluded from consideration, although put in the record under the equity rule. (R .....).

Other evidence which had been introduced by the Com-

pany was also pointed to by the City as showing negligence on the part of the Company which rendered impossible the making of a mortgage for securing the certificates or issuing and advertising them for sale. This evidence was in part disclosed by the Company's "offer" whereby delivery of title papers could not be obtained without first making payment in cash, whereas the plan for payment necessitated a delivery of title papers first so that the mortgage could be made and utility certificates backed by the mortgage and the revenues to be obtained from the property could be issued, in order to obtain the funds from the sale of such certificates with which to purchase the property.

The accounting feature was of minor consequence for a stipulation was made which covered all of the items and the amounts, subject to court determination concerning the legal phases. The result of the trial was a decree as above indicated.

The City appealed to the Supreme Court which likewise ruled with the Company, taking the view that Judge Wilson had reopened the case and heard further evidence concerning the subject of negligence (which was an error of fact); that the previous decision of the court had properly placed restrictions on the scope of the inquiry on the subsequent trial before Judge Crawford; that the language then used concerning the matter of a remedy for the Company, the liability of the City for damages, the measure of damages

and the restricted inquiry, constituted law of the case at the further trial before Judge Crawford. The Supreme Court, as above indicated, took the further view that the amount of damages allowed by the lower court was insufficient. The Court thereupon increased the amount so that the judgment against the City at the time of entering the mandate was $1,135,676.07 on September 17, 1946, although the City had no power to enter into a contract or otherwise incur an obligation like that here imposed, the City (and the Company as well) had executed a contract which provided for avoiding such obligation, the City had discontinued the Carroll Public Market about the time the Company had completed the building, and the Company was permitted to retain all of the property including the income during and after the market operation.

JURISDICTIONAL STATEMENT

It is contended that the Supreme Court of the United States has jurisdiction to review the judgment here in question by virtue of Article III, Section 2 of the United States Constitution and amended because the rulings above mentioned by the Circuit and Supreme Courts of Oregon deprived the City of a right under the 14th Amendment of the Federal Constitution, viz., a right to have due process of law,—a right to know before trial that a case in tort for damages was to be presented in addition to a case on con-

tract for specific performance; a right to have definite specifications beforehand of what were to be charged as negligent acts proximately causing damage to the Company and showing the amount of damages resulting therefrom; a right to have a fair opportunity to make countercharges showing that the proximate cause of the alleged damages was negligent acts of the Company and that the Company, because of certain acts, was estopped from asserting damages as claimed; a right to have a fair trial on issues thus framed and without having the scope of inquiry so limited as to prevent the City from showing that it was not negligent and that the failure of payment was due to negligent acts of the Company.

THE QUESTION PRESENTED

The question here presented is whether or not the City of Portland shall be allowed to present to this court a showing that under the 14th Amendment of the Federal Constitution it has a right of fair trial on charges to be previously made concerning its supposed negligence and the damages proximately resulting therefrom, and upon countercharges showing acts of negligence on the part of the Company which constituted the proximate cause of nonpayment to the Company, and failure of the City to acquire the market property, equipment, materials and supplies which it expected to acquire in lieu of the Carroll Public Market.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The reasons relied upon for the allowance of the Writ of Certiorari prayed for in this matter are:

(1) That the Supreme Court of the State of Oregon has decided a federal question of substance not heretofore determined by this court;

(2) That such decision is not in accord with the applicable decisions of this court, and

(3) That the case presents a matter of great public importance in this,—that all cities and other governmental bodies and all taxpayers in Oregon will, unless relief is granted by this court under the Fourteenth Amendment, be stripped of every protection which has been provided or may be provided by statutory, constitutional and charter provisions.

If the decision of the Supreme Court of Oregon be permitted to stand as it is and without relief from this court, it will be a precedent throughout the entire country. Other cities and municipal corporations will be subject to the same predicament in which the City of Portland now finds itself. In fact unscrupulous promoters and public officials lacking in sound business judgment or overly ambitious will be afforded a means of avoiding all restrictions upon public indebtedness and taxation.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue under the seal of this Court directed to the Supreme Court of the State of Oregon, commanding said court to certify and send to this Court a full and complete transcript of the record of the proceedings of the said Supreme Court of Oregon had in the case numbered and entitled on its docket, No. 4231, Public Market Company of Portland, Respondent, Cross Appellant, vs. City of Portland, Appellant and Cross Respondent, and Reconstruction Finance Corporation and The First National Bank of Portland (Oregon), Respondents, Cross Appellants, to the end that this cause may be reviewed and determined by this Court as provided for by statute; and that the judgment herein of said Supreme Court of Oregon be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated, November 30, 1946.

THE CITY OF PORTLAND, Petitioner,
JAY BOWERMAN,
Yeon Building, Portland 4, Ore.
LYMAN E. LATOURETTE,
MARIAN C. RUSHING,
City Hall, Portland 4, Ore.
Counsel for Petitioner.

In
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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of Court Below

The opinion of the Supreme Court of Oregon (R) is reported in 170 P. (2d) 586. For prior opinions see 171 Or. 522; 130 P. (2d) 624; 138 P. (2d) 916; 160 Or. 155; 82 P. (2d) 440.

Jurisdiction

1. The date of the decree to be reviewed is June 25, 1946. (R). A petition for rehearing was filed August 20, 1946, within time as extended (R). The court denied the petition September 10, 1946, and sent a

mandate to the Circuit Court on the 11th (R). The time within which a petition for a writ of certiorari may be filed with the clerk of this court is three months from the date of the denial of a petition for rehearing in the court below in case such petition has been timely filed, as here (Schlosser v. Hemphill, 198 U. S. 173, 175, 49 L. ed. 1000, 1002, 25 S. Ct. 654; United States v. Ellicott, 223 U. S. 524, 56 L. ed. 535, 32 S. Ct. 334; Morse v. United States, 270 U. S. 151, 70 L. ed. 518, 46 S. Ct. 241; Coe v. Armour Fertilizer Wks., 237 U. S. 413, 418, 59 L. ed. 1027, 1029, 35 S. Ct. 625; United States v. Seminole Nation, 299 U. S. 417, 81 L. ed. 316, 57 S. Ct. 283).

2. The statutory provision which is believed to sustain the jurisdiction of this court is section 237(b) of the United States Judicial Code as amended, which provides for certiorari to the highest court of a state "where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution * * * of * * * the United States" as well as Article III, Section 2 of the United States Constitution.

3. The facts which show that the nature of the case and the rulings below were such as to bring this case within the jurisdictional provisions relied on are as stated in the foregoing petition for a writ of certiorari, reference to which is hereby made, especially to pages 1 to 21. Additional facts as thought important to give the court a full understanding

of the matter will be stated below in connection with the argument.

4. The cases believed to sustain said jurisdiction are as follows:

The cases most nearly applicable are believed to be: Coe v. Armour Fertilizer Wks., 237 U. S. 413, 418, 59 L. ed. 1027, 1029, 35 S. Ct. 625; Gorman v. Wash. Univ., 316 U. S. 98, 100, 86 L. ed. 1300, 1302, 62 S. Ct. 962; Osment v. Pitcairn, 317 U. S. 587, 87 L. ed. 481, 63 S. Ct. 21.

Other cases sustaining the jurisdiction here claimed are: Schlosser v. Hemphill, 198 U. S. 173, 175, 49 L. ed. 1000, 1002, 25 S. C. 654; La. Nav. Co. v. Oyster Com., 226 U. S. 99, 101, 57 L. ed. 138, 140, 33 S. Ct. Rep. 78; Chesapeake & O. R. Co. v. McCabe, 213 U. S. 207, 214, 53 L. ed. 765, 768, 29 S. Ct. 430.

Statement of the Case

This has already been given in a chronological manner in the preceding petition for the writ under the headings, Summary Statement of the Matter Involved, Reasons Relied on for the Allowance of the Writ, and Questions Presented (pp. 1-21; 23 and 24), all of which is adopted and made a part of this brief.

An additional statement should, as we think, be made as follows: The case involves three very important subjects, (1) the right under the 14th Amendment of the Federal

Constitution of a citizen to have a fair trial on any controversy involving a substantial right; (2) the nature of such right as being substantial, and (3) that this city and all cities and other governmental bodies, and all citizens who are taxpayers, have a substantial interest in the matter here involved because it concerns the power, by judicial action, substantially to nullify charter, legislative and constitutional restrictions on the power of taxation and indebtedness.

In order that the court may quickly see how these points are involved we will follow with a specification of errors on the part of the Supreme Court of Oregon and on the part of the lower court at the last trial, and then follow with an argument which will at the same time cover the assignment of errors collectively and the points above mentioned.

Specification of Errors

The Supreme Court of Oregon erred, as we maintain, in the following particulars:

The overall error is the conversion of the case from one on contract for specific performance to a case for recovering damages ex delicto for *supposed* (all italics are ours for emphasis) negligence, fixing the measure of damages and requiring the court below to assume negligence and follow that measure of damages without previous allegations specifying the negligence acts and the amount of the alleged damages proximately resulting therefrom, or giving the

City an opportunity to justify its actions and show negligence on the part of the Company which constituted the proximate cause of its supposed damage.

This general error was the result of particular errors which we will detail as follows:

(1) In holding that the Company had fully performed the contract on its part.

(2) In holding that the City had wrongfully repudiated the contract.

(3) In holding that the Company was entitled to relief by way of damages in case the proofs showed that the contract price exceeded a reasonable value of the property as of November 14, 1934.

(4) *In holding that the lower court, in taking such proof, must restrict the scope of inquiry to the amount payable under the contract less the value of the property as of November 14, 1934.*

(5) *In holding that the damages determined on this basis be supplemented by adding interest at 6 per cent per annum from November 14, 1934.*

(6) *In holding that the true measure of damages was not to be based upon the amount for which the utility certificates might have been sold if the entire amount authorized had been placed on sale in the manner provided by the authorizing ordinance.*

(7) *In holding that it (the Supreme Court) had jurisdiction, after having determined that the Company was not entitled to specific performance, to make a determination that the plaintiff was entitled to relief and at the same time fix the character of relief and measure thereof to be given on a further hearing, limited solely to that issue.*

(8) In holding that portions of an opinion which were not necessary to a decision and therefore dicta, such dicta in effect converting a suit in equity for specific performance to a claim for damages ex delicto although there were no pleadings or proof to support such theory, became the law of the case thereby limiting the judge of the court at the subsequent hearing to the sole issue of damages.

(9) *In holding that such course would not deprive the City of due process of law in violation of the 14th Amendment to the Federal Constitution.*

(10) In holding that the views previously expressed (for which see 171 Or. at pages 579-696) became binding upon the parties and restricted the inquiry as noted.

(11) In holding that when the case was previously on trial (before Judge Wilson) he, after holding that the contract imposed no general obligation on the City, *reopened the case and took further testimony,* notwithstanding the record to the contrary (R).

(12) In erroneously assuming that the supposed

further testimony was in the record and applied to the questions concerning the relief which should be afforded to the Company and the measure of such relief.

(13) In holding that it (the Supreme Court) did not exercise original jurisdiction when it denied the City its day in court by deciding in a suit ex contractu that the City was liable in damages ex delicto and fixed the measure of damages to be followed on a further hearing in the lower court, thereby barring the City from its right to defend against a claim for damages never made by the Company and therefore not defended against by the City.

(14) In holding that the facts showed that the plaintiff was entitled to a remedy, and proceeding to fix the remedy.

(15) In holding that the nature of that remedy was squarely presented by the record before the court when the remedy was declared, notwithstanding the record to the contrary (R).

(16) In holding that there was no evidence of a different character before it at the time of the last hearing, (see 42 Or. Ad. Sheets 873, 170 P. (2d) 586) than what was before it at the time of the previous hearing (R).

(17) *In holding that the relief to which the Company was entitled was fully presented on the former appeal and there was no merit in the proposition that the requirements of due process of law had not been met.*

(18) In holding that performance of "the contractual duty of the City to provide the fund by the issuance and sale of public utility certificates" was not prevented by the Company.

(19) In holding that the Company did not prevent the City from giving a mortgage to secure utility certificates or from issuing and offering the certificates for sale and that this question was substantially the same as was *"raised by the pleading and argument on the former appeal and was necessarily decided adversely to the City."* (R).

(20) In holding that there were two tenders of conveyance to the City, and that the second was met by a flat repudiation of the contract and of any obligation under it whatever.

(21) In holding that "the tender conforms strictly to the provisions of paragraph 7 of the contract," and even though it could be said to be defective for the reasons assigned by the Company, the defect was waived by the City's repudiation of the contract.

(22) In holding that the record made at the trial before Judge Wilson "explored every phase of the controversy except the accounting and the value of the property", thereby implying that the record then made explored the Company's subsequent claim that the City was liable in damages for supposed negligence. (R).

Further errors of a less important nature need not be mentioned here.

ARGUMENT

Summary Statement

Point A.

The Supreme Court of Oregon violated the 14th Amendment of the Federal Constitution.

Point B.

The City as a result will suffer injury to the extent of approximately one and one-quarter million dollars if relief is not obtained from this court.

Point C.

This case involves a matter of great public importance because of the nullifying effect that it now has upon all efforts, by constitutional, statutory or charter restrictions that have been heretofore made and which may hereafter be made, to maintain governmental activity on a pay-as-you-go basis.

PREFACE

As a preface to the argument we call attention to the fact that when the case was on trial before Judge Wilson (the first trial) the all important question was whether the contract provided for a general obligation on the part of the City to pay, or a special obligation payable only from a sale of utility certificates if a sale could be made. Under the charter of the City of Portland (Sec. 10-104 of 1942 Compilation) the City is authorized to issue and sell interest bearing public utility certificates for construction or acquisition by purchase or otherwise of any public utility within the city. Such certificates "* * * shall be secured by a mortgage or mortgages upon such public utility plant and the revenues thereof, but the same shall not be a general liability of the City and shall be paid solely from the revenues derived from the plant or from the sale thereof." Such certificates were contemplated in the contract which is set forth in the supplementary portion hereto. The evidence centered in great detail on the circumstances under which the contract was drawn; the discussions that took place between the Company's officials and the City's officials at the time of preparing the contract (and this embraced a study of the different drafts of contract that were prepared); the interpretation given to the contract by the Company's officials and the City officials after the final draft was made and immediately before signing; subse-

quent statements by Company officials to the effect that the contract could not be a burden on the taxpayers of Portland because the City was obligated only to pay for the property by issuing utility certificates and such certificates were payable only from the property itself; statements in the Whitbeck case by the pleadings, argument and brief; the constitutional and other restrictions on the tax levying power of the City Council at the time the contract was made and subsequently, and charter provisions concerning the budget system and expenditures, thus placing the City on a strictly cash basis and keeping it within the limits of its budget; and the amount of city indebtedness and the special limitation applicable when purchasing a public utility. (See 171 Or. 533-578 and R).

The record of that trial also involved a controversy concerning performance on the part of the Company, it being alleged by the Company that it had fully performed on its part. This was denied by the City. The main portion of this controversy related to the covenant that the Company make the property into a "going public market utility" prior to conveying it to the City. This was construed by the Company as requiring nothing more than having the building completed, the doors opened and the building occupied in some part by persons having food for sale and the City claiming that it required not only that, but a showing of such occupancy as to yield an income sufficient reasonably

to warrant investors in securities to purchase the proposed certificates, whereas the Company's operation through a period of eleven months showed a failing enterprise to the extent of $11,000.00 per month (R and).

There was no allegation in the complaint on which the case was tried before Judge Wilson indicating in the least that the Company expected to hold the City in damages for a breach of contract or that it expected to require a specific performance by way of issuing and advertising certificates for sale or that any other theory or basis of relief would be sought. There was not the slightest indication that, if specific performance could not be obtained on the theory that the contract imposed a general obligation upon the City, a type of relief would be claimed such as that asserted in the Supreme Court upon the appeal by the Company from Judge Wilson's decree dismissing the case,—such relief to be based upon the theory of damages ex delicto by which is meant a case as in tort based on allegations of negligent acts on the part of the City proximately resulting in damages to a certain amount to the contractor, and with opportunity for the City to make a defense on denial of such negligence and proximate damage, and show that the damage, if any, sustained by the contractor, was the proximate result of negligence on its part. (R).

When it appeared from the evidence taken before Judge Wilson that the contract would be ultra vires and void if

construed as creating a general obligation on the City, the case had gone as far as it could under the theory and allegations of the second amended complaint. This is true because the court on that state of the record had no other basis for granting relief without violating the 14th Amendment of the Constitution even though it be assumed that the Company had fully performed all of its obligations.

This is the crux of the accompanying petition whereby the City seeks the protection afforded by the Federal Constitution. Apparently the Supreme Court was confused concerning the state of the record and the matters which had been litigated before Judge Wilson. Such confusion may have resulted in part from the controversy between the parties as to whether the Company had fully performed its part of the contract by making the property into a "going public market utility" and in part (perhaps chiefly) by the erroneous thought that the record showed that Judge Wilson after reaching this conclusion had allowed the Company to reopen the case and take further evidence on an assumed issue of negligence as in tort, although the certification to the Supreme Court of the record of proceedings before Judge Wilson showed no such new issue and showed no evidence taken on such theory (1st Tr. ; R).

POINT A

Right of Fair Trial

The right of fair trial is an elementary and fundamental right inherent in civilized government. The 14th Amendment merely puts in words what had previously existed in Anglo Saxon and Aryan culture when not obstructed by kings or other rulers. Our American jurisprudence as controlled by this court has revolved about this central precept. No citation of authority need be given except to show that the fundamental rule was in this case violated and to show further that the violation, if it go unchallenged, may result in many other violations of a similar character. This result is manifestly true because of the fact that, when the principle is violated by a state court of last resort, there is no alternative except submit to the infraction or incur the expense of bringing the matter to the attention of this court for correction.

No case has been found where an infraction of the principle has occurred by a court on all fours with this case. A ruling found most nearly applicable to our case (as the result of considerable search) is Coe v. Armour Fertilizer Wks., 237 U. S. 413; 59 L. ed. 1027; 35 S. Ct. 625. This case applies to two of the points in the case at bar,—viz. (1) that a right to request this court to grant relief does not arise where the case has been remanded for further trial until after such retrail and a final disposition of the case, and (2)

that if the opinion and mandate of an appellate court, which authorizes the lower court to retry the case, restricts the new trial so that the defendant does not have fair information concerning the charges, opportunity by proper evidence and argument to resist such charges, make and substantiate counter charges, the law of due process has not been followed. The case involved a state statute which gave a judgment creditor against a corporation the right to an execution against a stockholder to the extent of the unpaid subscription on his stock, the fact to be ascertained from the company's books by the Sheriff. The trial court, upon application of the alleged stockholder for an order quashing the writ ordered it quashed but not on the ground that the statute was unconstitutional, taking the view that the writ was improperly issued without some preliminary steps. On appeal the ruling was made that the statute required no preliminary steps and that there was no general law or rule requiring previous notice to the stockholder; that the stockholder became such with knowledge that, under the statute, upon a return of nulla bona, an execution might issue against him for his unpaid subscription, and that the statute afforded the means whereby the Sheriff could obtain definite information as to the stockholders and the amount of their unpaid subscriptions. The mandate to the Circuit Court was that further proceedings be had "as, according to the writ, justice, the judgment of the Supreme Court, and the laws of the state of Florida ought to be had."

The Circuit Court then denied the motion to quash. On appeal by Mr. Coe it appeared that he did not claim that he was not a stockholder nor that there remained no balance due on his stock, but he stood "boldly on his attack upon the constitutionality of the act." This court, after having allowed a writ of error, reversed and remanded the cause for further proceedings not inconsistent with the court's opinion which was to the effect that:

> "* * * before a third party's property may be taken to pay that indebtedness (of the corporation to its creditor) upon the ground that he is a stockholder and indebted to the corporation for an unpaid subscription, he is entitled, upon the most fundamental principles, to a day in court and a hearing upon such questions as whether the judgment is void or voidable for want of jurisdiction or fraud, whether he is a stockholder and indebted, and other defenses personal to himself."

As to the suggestions that the stockholder's property was not actually seized; that he knew of the execution, and had an opportunity to present the merits of his objection on his motion to quash, this Court said:

> "The fallacy of this is that *it ignores the issue of law raised by petition of plaintiff in error, and substitutes an issue of fact for which he was not summoned and which he has not consented to litigate.* * * * Nor can extra-official or casual notice, or a hearing granted as a matter of favtor or discretion be deemed a substantial substitute for the due process of law that the Constitu-

tion requires." (pp. 423 and 424 of 237 U. S.; 1031 and 1032 of 59 L. ed.).

A case quite in point is Waggoner Nat'l Bank v. Welch, 164 Fed. 813, 816; 90 C.C.A. 589, where an attempt was made after a case was tried to change from a theory of tort to a theory of contract (the reverse of the case here at bar). The Court at page 816 said "A valid judgment must accord with the allegations and prayers of the pleadings and determine the issues which they present."

Allen v. Pullman Palace Car Company, 139 U. S. 658, 662; 35 L. ed. 303, 304; 11 S. Ct. 682, was a case where attention was called to the fact that the prayer of the complaint included a general prayer for relief (as in this case) but the court held that this was not sufficient to warrant relief different from that warranted by the allegation of fact. The court at page 662 of 139 U. S. said:

> "It is true that there was a prayer for general relief, but relief given under a general prayer must be agreeable to the case made by the bill, and in this instance the complaint sought a preventive remedy only."

In Kelsch v. Miller, 73 N. Dak. 405, 15 N. W. (2d) 433; 155 A. L. R. 1186, which was an action to determine adverse claims to certain land, the court had this to say about an effort in the Supreme Court to present questions that were not raised in the trial court and which were foreign to the theory on which the case was tried (quoting

from another North Dakota case, page 1198 of 155 A.L.R.):

> "The rule is elementary that where the parties act upon a particular theory in the trial court, they will not be permitted to depart therefrom when the case is brought up for appellate review. This is true of the construction placed upon pleadings. 3 C. J. p. 725. It is true as to the relief sought and the grounds therefor. 3 C. J. 730. It is true generally as to the theories acted upon by the parties in the court below. See 3 C. J. 718, et seq. A party cannot proceed with a trial upon one theory and advance another and inconsistent theory on appeal. * * *."

This is but a statement of the rule generally applied throughout the land (16 C. J. S. 1260 and 1261, "Constitutional Law" sec. 620). It applies most emphatically to the case here because the second amended complaint contained no allegations on which to predicate relief by way of damages ex delicto. The allegations confined the case to a breach of contract calling, as the Company claimed, for a payment of a specific amount as a general obligation (not even claiming alternative relief by requiring the City to proceed with a sale of the certificates, and not setting forth any allegations for relief on the ground of a breach of contract, which would have been a case at law and not in equity).

It has been said that even in an action for damages on a contract, equity may take jurisdiction when a long account is involved, and this was mentioned by the Oregon Supreme

Court when this case was first before it on a demurrer to the complaint (160 Or. 155; 83 P. (2d) 440). The statement was founded upon allegations to the effect that a long and involved accounting was necessary between the parties in order to establish the full amount of the purchase price. When, however, the case came to trial it appeared that all of the data which concerned the full amount of the contract price (cost of equipment, materials and supplies, number of lessees obtained, amount of rental, and all other items) were within the knowledge of the Company. The account proved to be so simple that it was disposed of by stipulation except as to legal phases. Thus it now appears, as it did when the case was before the Supreme Court after the trial before Judge Crawford, that there was no long or involved account and no basis for equity jurisdiction. (R).

The point we emphasize, however, is that the Company never sought relief by way of damages, it never set up allegations suitable for awarding damages ex delicto or damages for breach of contract. The general prayer was, therefore, of no avail.

At and prior to the decision of Judge Wilson the pleadings as to the contract were entirely devoid of any suggestion of damages ex delicto. The Supreme Court, however, stated that the Company was entitled to relief; that such relief should be obtained on the theory followed in street improvement cases, viz., damages ex delicto, and that the

measure of such damages should be the difference between the contract price and the value of the property as of November 14, 1934, in consequence of which the case should be reversed and the parties allowed to amend their pleadings and take evidence to establish the difference between the contract price and the value. (R).

This gave the City warning about what to expect, but still the Company, although amending its complaint and alleging a failure of the City to advertise and sell certificates in order to create the fund, did not set up the amount that it claimed as the contract price although it had all the information from which to state the amount. It alleged the value of the property as of November 14, 1934 to be $550,000.00, although the building alone cost more than this. Nevertheless, the City by its answer denied the substantial part of the new allegations and alleged facts tending to show that by certain acts of the Company the City was prevented from selling the certificates, or even making a mortgage as a basis for issuing them, and the City further alleged that it was entitled under the 14th Amendment of the Federal Constitution to present an issue and have a hearing on these matters. The trial court, feeling bound by what was said by the Supreme Court, ruled that the inquiry was restricted to the rule announced by the Supreme Court, and later the Supreme Court, on the City's appeal, affirmed this decision. (R).

In effect, the decision of the Oregon Supreme Court reversing Judge Wilson, as interpreted by Judge Crawford, which interpretation was affirmed by the Supreme Court, found the City guilty and liable in damages ex delicto and thereby would foreclose the City from having its day in court on these points and showing its defenses, but allowing the Company to prevail without necessity of alleging or proving these points. (R)

Thus, as we respectfully submit the City was denied due process of law.

POINT B

The City as the Result of the Court Action will suffer Damages approximating One and One-quarter Million Dollars.

The judgment rendered together with the accumulated interest at six per cent per annum for twelve years, fixed by the court as a part of the damages already amounts to approximately that sum.

The vice and danger of conducting litigation by changing a cause of action in an equity suit for specific performance of a contract, to a law action for damages ex delicto for the recovery of a money judgment without changing the pleadings and giving the defendant an opportunity

to defend against the claim for damages, is well illustrated by the judgment awarded in this case.

The Supreme Court held with Judge Wilson that the contract did not create a general obligation against the City and would have been ultra vires and void if it did create such general obligation. However, the Supreme Court without pleadings therefor or proof adjudged the City guilty of breach of the contract, and decreed that it was liable for damages resulting therefrom measured by the difference between the contract price and the value of the market property on November 14, 1934. (171 Or. 533-578).

The Company had made a conditional tender of a conveyance of the market property and demanded full payment of the contract price. (R).

This demand was based upon the assumption that the contract did create a general obligation, and the City passed a motion denying such liability. (R).

In deciding the case on appeal from Judge Wilson's decision, the Supreme Court held that the contract required payment to be made from the proceeds of utility certificates secured by a first mortgage on the market property and payable only from the earnings of the operation of the market or the sale of the property .(171 Or. 556-565).

The plaintiff has never alleged that these certificates were ever salable or that the required amount of money

could ever have been procured from this one available source of money.

The contract between the City and the Company required that *"upon the completion* of said public market building * * * it (the Company) will convey to the City by warranty deed * * * good and marketable title to the property". It is alleged (Abstract 11): "The building * * * was completed and ready for use and occupancy on December 15, 1933 * * *." (R).

The record discloses that instead of observing its contractual obligation the Company proceeded to occupy the building itself and to operate a market therein until November 9, 1934, at which time it made its alleged offer of performance or tender of conveyance. (R).

The property at that time was encumbered by a first mortgage securing $774,500 of 10-year bonds bearing 6% interest, which the RFC had purchased at 93½% of par.

During the six and one-half months from December 15 to June 30, the Company had operated this market business at a loss of $11,000 per month. The RFC audit for this period is in evidence in this case and discloses an operating record which would have prevented any normal person from seriously considering the purchase of these utility certificates secured only by this property and its *operating profits.*

This occupancy and operation was voluntary on the part

of the Company. The Company employed a manager at $800.00 per month who was inexperienced in the operation of a market; it paid its inexperienced secretary $300.00 per month during this period; it failed to pay the interest on the RFC loan bonds; it failed to pay the public taxes and maturing City liens against the property; it became involved with its commercial creditors and was sued or threatened with suit on various items, and generally created a condition which would have prevented the sale of these securities. (R).

If this suit had been brought for specific performance of contract and a decree prayed for, requiring the City to sell these securities and thereby raise the purchase price, the City would have been able to set up its defense that the securities were unsalable due to the misconduct of the Company in operating the property at said loss, which would destroy the salability of the certificates.

If this action had been brought or the pleadings amended so as to make an issue of the City's liability for damages in an action sounding in tort, the City could have defended and charged that the Company itself had destroyed the salability of the securities and rendered it impossible for the City to procure the money from the one available source, to-wit, the sale of the certificates.

The Supreme Court in the appeal from Judge Wilson's decision stated that while the City was not liable on a

general obligation for the contract price of the property, it was liable in damages ex delicto for the full amount of the contract price plus 6% interest, less whatever value the property might have had on November 14, 1934.

The case was remanded with instructions to determine one question only, and that was the amount of these damages as above defined and limited.

By this method the City has been denied its constitutional right of having its day in court and, with proper pleadings, having the issues determined, first, was the City liable in damages, and, if so, the amount thereof.

We have the following result of this proceeding conducted as above:

As to taxes, the contract between the Company and the City provided:

> "It shall also be permissible for said title to be subject to taxes and assessments due and payable after November 5, 1931. The Company agrees that it will pay all legal taxes, assessments and interest which become due and are payable after November 5, 1931, up to the time that it delivers title to the City, and the City agrees that it will reimburse said Company from funds derived *from the sale of Public Market Utility Certificates* for all sums which said Company *shall pay* for such taxes, assessments and interest, with interest at six per cent from the date of said *payment or payments.*" (See appendix).

The RFC audits, Defendant City's Supplemental Exhibits 6 and 7, disclose that liens for local assessments were in default in the sum of $36,908.75 (Ex. 7, p. 8) and that taxes for the years 1933 and 1934 were in default in the sum of $31,097.50. (R).

The Supreme Court, in Advance Sheets 42, page 890, affirmed the judgment of the lower court for taxes in the sum of $45,085.03, of which $15,976.62 had been paid, and that the taxes amounting to $29,108.41 had not been paid. These paid and unpaid taxes total $45,085.03. (170 P. (2d) 594).

The Supreme Court held that the Company was damaged to the full extent of all of these taxes, although it had awarded interest on the money paid in the sum of $1,690.55 and then awarded interest on taxes paid and the unpaid taxes at 6% for the twelve years following November 14, 1934. (170 P. (2d) 594 and 595).

No effect was given to the fact that the Company had not paid the taxes nor that the City had never received title to, or any benefit from, the property.

At the time the contract was made the property was subject to liens for street improvements and the intercepting sewer. The contract required a conveyance of a marketable title "but said title to said property shall be subject to the unmatured intercepting sewer and drainage system assess-

ments, which the City assumes and agrees to pay out of the revenues from said public market utility, * * *." (See appendix).

The Company did not pay any of these assessments. It kept its property and all the earnings thereof and never permitted the City to earn anything from this utility out of which to pay these assessments. Nevertheless, the Supreme Court has entered a judgment against the City for the entire amount, to-wit, $121,779.46 together with interest at 6% per annum for twelve years. (170 P. (2d) 594 and 595).

Judge Crawford held that the plaintiff's damage determined in accordance with the rules laid down by the Supreme Court in the appeal from Judge Wilson amounted to $500,000 plus interest at 6% from November 14, 1934. (R).

The Supreme Court on the same evidence and without the benefit of hearing the testimony or seeing the witnesses decreed that the Company's damage was $663,943.96 plus 6% interest from November 14, 1934. (R).

Ordinarily, a debtor is entitled to tender the amount of his obligation and be relieved of liability for interest. In this case tender of the amount decreed by Judge Crawford would have been ineffectual, for the Supreme Court has

found that it was $163,943.96 less than the actual damage suffered by the Company.

This reference to the determination of the amount of damage is of particular interest in view of the fact that the case was tried under a complaint for specific performance of a contract and then judgment awarded for an amount ascertained by the Court without the benefit of formal pleadings alleging the amount of the plaintiff's damage.

Mention may be made in opposition to the City's petition for a writ of certiorari that the City is merely seeking another trial upon matters which have already been tried and determined and that the petition is in effect frivolous. The answer to this is, as above indicated, that the City has had no trial, no issue and no hearing on the subject of damages ex delicto. The trial before Judge Crawford cannot be regarded as a fair trial of the case as one in tort for damages. Indeed, it was no trial at all on such issue, for the trial court, feeling itself bound by what was said by the Supreme Court, held that the evidence tendered on the part of the City showing negligence by the Company which contributed toward the non-salability of utility certificates, mismanagement and negligence on its part which prevented the City from giving a mortgage to secure the cerificates could not be considered although received under the equity rule. Thus the door was closed in the face of the City and the only recourse now available is to seek the protection of this court

because of the right of fair trial vouchsafed by the 14th Amendment.

Another matter which may be suggested in behalf of the Company is that this market project has been a failure; that a great loss has resulted from such failure and that the City is the one who should bear that loss. A full discussion of this matter will be appropriate if the City is given a trial upon the theory of damages ex delicto. Still, lest the court looking now at the general equities of the case be, less inclined to grant relief, we will mention a few facts which are hardly controverted.

The Company started the project as a private enterprise,—a public market under private ownership and management, although the City at the time was conducting a public market under municipal ownership. The Company presented to the City data which it had compiled as a result of much study and consultation with managers of other large market projects, all of whom gave written statements indicating that the project as proposed on the site to be made available by a certain street vacation, and a building to be erected according to certain plans, would be suitable and successful whether under municipal ownership or under private ownership, but likely to be more successful under private ownership than municipal ownership. The City required some substantial alteration in the building plans, but this in any case was necessary because the building

was so located and planned as to cause greater pressure against the harbor wall than was permissible under the easement that had been given, or else add expense of carrying the supporting columns below the wall footings (an expense which would have been practically prohibitive, R). The City suggested a change in the towers so as to give the building a more impressive appearance and carry a better advertising feature. Minor changes were made. The major changes made a substantial increase of cost but the City suggested other changes which made a substantial decrease of cost. The Company, however, raised no objection to these changes (whether increasing or decreasing the cost) although the Company knew at the time that the City had no funds available for the purchase of such market property and was providing for payment by the sale of utility certificates if the City became a purchaser. (R).

Still other changes were made after the building plans were finally adopted and the contract made. Many of these changes were approved by the City. Some of the larger changes were not approved, such as the installation of a heating plant in place of piping heat to the building and using heat furnished by a public utility company, heavy expense for alterations in order to install a sugar mill, etc. The allowance or disallowance of these items, as well as other items of a minor nature, were never passed upon by

the City Council because the Company (as shown by the evidence taken before Judge Crawford under the equity rule) never presented proper data for action. (R).

Other evidence before Judge Crawford taken also under the equity rule, except as it had a bearing on the value of the property as of November 14, 1934, showed that the location and building were suitable for the market project as launched by the contract between the Company and the City and that the enterprise would have been successful if a suitable manager had been placed in control. (R). The Company never offered to give the City the management of the market operation unless the City would pay in cash for the entire property,—and this proposal was after the Company had concluded to hold the City liable as on a general obligation and after the Company had itself assumed management and control as soon as such building and tenants were available. This was done on December 15, 1933, although the building was not at the time fully completed to the satisfaction of RFC. Nevertheless, the Company continued operation for a period of almost eleven months before making any formal proposal to convey the property to the City and during such operation it incurred heavy overhead expenses and so poorly conducted the operation that losses were experienced each month so large that no investor in utility certificates based principally upon

the income from the property would be interested in purchasing (R).

Who then in equity and good conscience should bear the loss? Note in addition, that the City on the strength of the operation assumed by the Company disposed of the equipment constituting the Carroll Public Market which it previously owned and operated. (R).

We have acknowledged, as suggested by the Oregon Supreme Court, that the situation between the Market Company and the City has some elements comparable to the situation between a street improvement contractor and the City where payment is to be made from a local assessment by the City, but at the same time we called attention to the important and controlling differences. These differences we may here briefly mention.

In the latter case the contractor has spent his money for a street improvement and has nothing unless he can obtain relief because the City officials neglected to make the assessment, while in the case here at bar the contractor owns the property which is a good property as shown by the expert market operators with whom the Company consulted before launching the enterprise, and as shown by expert market operators testifying before Judge Crawford (R). In the street improvement cases the City authorities have the undoubted power to make a local assessment for the cost of the improvement by merely following the program set

out by the law, while in this case the City officers could not require investors to invest in utility certificates and this was especially true after the Company had assumed the management and control of the market operation without offering to give the City possession, management or control until its management had become so unsuccessful that utility certificates could not be sold. (R).

Another important feature is the fact that the street improvement cases were decided in Oregon prior to the time that the local budget law was passed, before severe restrictions had been placed on municipal expenditure, taxation and indebtedness (Secs. 69-1101 to 69-1217, Oregon Code 1930 and Article XI, Section 11, of the Oregon Constitution). It is not believed that the theory followed in the local assessment cases whereby the contractor is given a judgment for damages as a general obligation although the contract was made payable exclusively from a local assessment fund, would now be followed in view of the public policy shown by the constitutional and statutory provisions on indebtedness and purchasing power, but rather the improvement contractor would be given his remedy in mandamus to force the municipal officers to make the assessment in accordance with the statute (and this we might suggest is a remedy which the Company always had against the City if the City in fact neglected

anything that it should have performed in the way of selling certificates).

The cases concerning municipal liability by the ex delicto theory may be found in the annotation following Town of Capitol Heights v. Steiner, (211 Ala. 640, 101 So. 45) as reported in 38 A.L.R. 1264, the portion of the annotation especially applicable concerning municipal debt limits in connection with local improvements beginning at page 1277. The Alabama case is the latest of importance in point of time (1924) which has come to our attention. The Court held that the contractor would not be given the remedy by a general fund judgment on the theory of damages ex delicto (see also another annotation in 51 A.L.R. 973).

From the above we respectfully maintain that our Point B is well taken and that the objections which we anticipate will be found without merit.

POINT C

The Case involves a matter of great Public Importance.

We have under Point B discussed this subject to a limited extent and in the petition for the writ shown very briefly the great public importance this case holds not only

for all cities and other municipalities in Oregon but also for cities and municipalities throughout the United States.

If a court can by the theory of negligence ex delicto convert a special obligation contract of a tax levying body into a general obligation judgment notwithstanding the constitutional, statutory and charter provisions which require budgets to be prepared in advance of a tax levy, which require the governing authorities to restrict their expenditures to the items embraced in the tax levy, and which restrict the amount of each tax levy even though budgets have been made up which would exceed the tax levying power, then every means of protection against excessive taxation will be avoided and rendered futile. Other restrictions limiting the amount of liability on general obligation indebtedness and the amount of special fund obligations may be avoided in the same way.

In the City of Portland all these restrictions apply and in addition at the time this contract was made a Tax Supervising and Conservation Commission provided by the state statute had authority to pass upon each budget and proposed tax levy and to strike items of proposed expenditure. Yet, by the decree of the Oregon Supreme Court these restrictions and the public policy reflected thereby will have been largely wiped out and a new public policy established unless relief is given by this Court. (See appendix).

We therefore solicit relief from this court not only on behalf of the City of Portland but on behalf of all other cities and municipalities throughout the State of Oregon, and, we may add, throughout the United States, inasmuch as this decision if permitted to stand will be a precedent which other state courts may be inclined to follow.

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

JAY BOWERMAN,
Yeon Building,
Portland 4, Oregon,

LYMAN E. LATOURETTE,
City Hall, Portland 4, Oregon,

MARIAN C. RUSHING,
City Hall, Portland 4, Oregon,
Counsel for Petitioner.

APPENDIX

The constitutional provisions are briefly that:

> "Acts of legislative assembly incorporating towns and cities shall restrict their powers of taxation, borrowing money, contracting debts, and loaning their credit" (Art. XI, sec. 5), and that "unless specifically authorized by a majority of the legal voters voting upon the question neither the state nor any county, municipality, district or body to which the power to levy a tax shall have been delegated shall in any year so exercise that power as to raise a greater amount of revenue for purposes other than the payment of bonded indebtedness or interest thereon than the total amount levied by it in any one of the three years immediately preceding for purposes other than the payment of bonded indebtedness or interest thereon plus six per centum thereof * * * and any warrants for or other evidences of any such indebtedness and any part of any levy of taxes made by state or any county, municipality or other taxing district or body which shall exceed the limitations fixed hereby shall be void." (Art. XI, sec. 11).

The charter of Portland as passed by the Legislative Assembly in 1903 provides that the Council shall annually

> "levy the amount of taxes necessary to provide for the payment during the fiscal year of all properly authorized demands upon the treasury; but such levy, exclusive of the tax necessary to pay the interest accruing during the year on the bonded indebtedness of the city and exclusive of the sinking fund levy hereinafter provided, and exclusive of the levy for bridges hereinafter

provided shall not exceed for all other purposes the rate of seven (7) mills on each dollar of valuation of the property assessed." (Sec. 114, Special Laws of Oregon, 1903, later sec. 190 of 1926 comp.).

The charter provides:

"No money shall be expended or payment made from any fund of the city, except special assessment funds, until a specific appropriation shall be made therefor * * *."

"The Council shall not authorize any expenditure during any fiscal year, nor shall any liability or liabilities be incurred by or on account of the City of Portland, to be paid in any particular fiscal year (for the payment of which the approval of the Council shall be necessary) which singly or in the aggregate shall be in excess of the revenues received during such year applicable, or made applicable by transfer, to the payment of such liability or liabilities. And nothing contained in this charter shall authorize the enforcement against or collection from said city, on account of any debt, contract or liability, of any sum in excess of the limitations prescribed in this section.

"The city shall issue no warrants or other evidences of indebtedness, except under special assessment funds, unless there is money in the treasury duly appropriated and applicable to the payment of the same on presentation, and all evidences of indebtedness issued contrary to this provision shall be null and void. Any councilman voting to incur any liability or to create any debt in excess of the amount limited and authorized by law, shall be deemed guilty of malfeasance in office, and

for such malfeasance such member of the Council may be removed from office." (Sec. 117

The charter as amended in 1913 further provides:

"No bonds other than bonds for public improvements payable out of assessments upon the property benefited, and sewer bonds if otherwise authorized, shall be issued unless approved by vote of the people at a general or special election at which the question shall be submitted in the same manner as other measures are submitted under the initiative or referendum. * * *." (Sec. 92,—being sec. 227 of the 1926 Comp.).

The charter as amended in 1913 further provides:

"On or before the first Monday in October of each year the Commissioner in charge of each department of the City shall cause to be prepared and furnished to the Council, estimates in writing of the public expenses to be incurred in his department, and each branch thereof, for the ensuing fiscal year, *specifying in detail such probably expenditures.*" (Sec. 85 which is sec. 186 of the charter as compiled in 1926 and sec. 7-107 of the comp. in 1942).

The charter further provides:

"No indebtedness shall be incurred for the acquisition of any public utility under the provisions of this charter which, together with the existing bonded indebtedness of the city, shall exceed at any one time seven per centum of the assessed value of all real and personal property in the city, but in estimating such bonded indebtedness, all bonds given for the acquisi-

tion or construction of public properties and utilities, the interest on which bonds is paid out of the earnings of said public utilities or properties, shall be excluded * * *." (Sec. 160 and sec. 10-105 of comp. 1942).

In 1921 the Legislative Assembly passed a "Local Budget Law" applicable to all municipal corporations throughout the state, providing that it shall be unlawful to levy in any year any tax unless an estimate shall have been made "of the total amount of money proposed to be expended by the municipal corporation for all purposes during the fiscal year next ensuing." (Or. Code 1930, sec. 69-1103). The next section requires that such estimates "shall be fully itemized and shall be so prepared and arranged as to show in plain and succinct language each particular item of proposed expenditure * * *."

At the same session of the legislative assembly a commission known as the "Tax Supervising and Conservation Commission" was created in each county having a population of 100,000 or more inhabitants (and this embraces Portland which is in Multnomah County). This act requires the annual budget of each municipal corporation in such county to be submitted to this commission, before which the levying board had a right of hearing on all proposed levies to be made, and this *Commission had authority to "direct the several levying boards in the county to levy a tax in accordance with the findings and conclusions of said Commission* (Oregon Laws 1921, ch. 208; Oregon Code

1930, secs. 69-1206 and 69-1207). The act imposed severe penalties in addition to invalidity of a tax levy not made in accordance with the statute.

THE CONTRACT

THIS AGREEMENT, made and entered into the 28th day of October, 1931, by and between PUBLIC MARKET COMPANY OF PORTLAND, a corporation organized and existing under the laws of the State of Oregon (hereinafter sometimes referred to as the "Company"), and THE CITY OF PORTLAND, a municipal corporation of Multnomah County, State of Oregon, by its Mayor and Auditor (hereinafter sometimes referred to as the "City").

WITNESSETH

1. The Company agrees that within fifteen (15) days after the City shall have procured the approving opinion of legal counsel of the authority of the City to issue and sell the public market utility certificates authorized by Ordinance No. 61192, it will resume active construction of a public market building upon the real property in the City of Portland hereinafter more particularly described, according to plans and specifications hereto attached, marked Exhibit "A" and hereby made a part of this agreement, and that it will complete the construction of such building

according to said plans and specifications on or before July 15, 1932. The Company agrees that in the performance of the work the City, through its Building Inspector and/or City Engineer, shall have the right to inspect progress construction of the building from time to time for the purpose of ascertaining and reporting to the City whether or not said building is being constructed in accordance with the plans and specifications herein referred to. If at any time in the opinion of the said city officials the building is not being so constructed, it is agreed that they shall report such fact to the Company and to the City, and thereupon it shall be the duty of the Company to comply with the plans and specifications in the particulars designated by the said city officials. A failure upon the part of the Company to resume or complete said building within the times specified herein shall nullify this agreement, unless it develops that for reasons beyond the control of the Company, or by acts of God, or delays caused by litigation it cannot or should not be required to so resume or complete the building within said time, than and in that event and upon application therefor, the City shall give the Company such extension of time as the Council of the City may deem reasonable, under the circumstances and facts, in which to complete said building.

2. The Company agrees that it will acquire and install in said public market building within ten (10) days after

said building is completed, the equipment, materials and supplies more particularly described in Exhibit "B", which is hereto attached and hereby made a part of this agreement. In addition to the principal sum to be paid the Company, as hereinafter fixed, the City shall pay the Company the actual cost price of said equipment, materials and supplies estimated at this time to be approximately $46,418.00, plus ten per cent of the actual cost price to cover the services of the Company in making said purchases. Such purchases of materials, equipment and supplies shall be subject to the approval of the Council in all respects, including the prices therefor.

3. The Company agrees that upon the completion of said public market building and the purchase and installation therein of the equipment, materials and supplies described in said Exhibit "B", and as first approved by the Council, it will convey to the City, by warranty deed (and by bill of sale with relation to movable fixtures and personal property) good and marketable title to the following described property, to wit:

> The vacated portion of Yamhill Street, in the City of Portland, County of Multnomah, State of Oregon, which is particularly described as follows:
>
> All that portion of Yamhill Street which lies between a line commencing at a point on the south line of said Yamhill Street 40 feet easterly from the northwest corner of Block 75, in said City of Portland, run-

ning thence northerly and parallel with the easterly line of Front Street, in said City, to a point in the north line of said Yamhill Street, which point is 40 feet easterly from the southwesterly corner of Block 76 of said city and a line commencing at a point in the south line of said Yamhill Street which is 25 feet westerly from the present westerly harbor line of the Willamette River, running thence northerly parallel with and 25 feet distant from said harbor line to a point in the north line of said Yamhill Street which is distant 25 feet westerly from said harbor line;

and the vacated portion of Taylor Street, in the City of Portland, County of Multnomah and State of Oregon, which is particularly described as follows:

All that portion of Taylor Street which lies between a line commencing at a point on the south line of said Taylor Street 40 feet easterly from the northwest corner of Block 74, in said City of Portland, running thence northerly and parallel with the east line of Front Street in said City, to a point in the north line of said Taylor Street, which point is 40 feet easterly from the southwesterly corner of Block 75 of said City of Portland, and in a line commencing at a point in the south line of said Taylor Street which is 25 feet westerly from the present westerly harbor line of the Willamette River, running thence northerly, parallel with and 25 feet distant from said harbor line, to a point in the north line of said Taylor Street which is 25 feet distant from said harbor line.

Also all of Block 74, all of Block 75 and Lots 3 and 4 in Block 76, in the City of Portland, County of Multnomah, State of Oregon, except the southerly 4 feet of said Block 74 extending from a line beginning

> at a point 40 feet east of the easterly line of Front Street and extending parallel with the north line of Salmon Street to a point 25 feet easterly from the harbor line, and excepting also the easterly 40 feet of said Block 74 and said Block 75 and said Lots 3 and 4 of Block 76, and subject also to an easement vested in the City for the use of a strip of land 25 feet in width along the easterly side of said blocks and lots parallel with the harbor line of the Willamette River,

together with the building and improvements thereon and all equipment, materials and supplies therein, and furnish an abstract of title to said property. In lieu of an abstract of title the City reserves the right to require, at its expense, title insurance, and the Company agrees that upon demand it will deliver to the City, at the City's expense, but not exceeding the actual cost therefor, a title insurance policy covering said land and building to be issued by a company to be approved by the City, but said title to said property shall be subject to the unmatured Intercepting Sewer and Drainage System assessments, which the City assumes and agrees to pay out of the revenues from said public market utility, and to that certain party wall agreement between J. T. Hunsaker and Samuel Brown, dated November 3, 1873, recorded December 20, 1873, in Miscellaneous Book 2, Page 575, as modified by party wall agreement between Ann L. Lee and Joshua Roberts Mead, Stella B. Mead and William W. Mead, trustees of the estate of Stephen Mead, deceased, and W. P. Fuller Company, dated March 6, 1928,

and recorded March 23, 1928, in Book of Deeds 1142, at Page 4. It shall also be permissible for said title to be subject to taxes and assessments due and payable after November 5, 1931. The Company agrees that it will pay all legal taxes, assessments and interest which become due and are payable after November 5, 1931, up to the time that it delivers title to the City, and the City agrees that it will reimburse said Company from funds derived from the sale of Public Market Utility Certificates for all sums which said Company shall pay for such taxes, assessments and interest, with interest at six per cent from the date of said payment or payments. It shall also be permissible for said title, with respect to the vacated portions of Taylor and Yamhill Streets, to be subject to the right reserved to the City by the ordinance vacating said portions of said streets to repeal said vacations.

4. The ordinance by which the above described vacated portions of Taylor and Yamhill Streets were vacated specifically reserves to the City the right to repeal said vacation ordinance in the event the petitioner for said vacations, its successors or assigns, should fail to commence the construction of a market building upon the property vacated and adjoining property within three months from the effective date of said ordinance and complete the building within a reasonable time thereafter, and the City hereby agrees that said construction was duly and properly commenced

within the time limits specified in said ordinance and that since said date no unreasonable delay has occurred in connection with the completion of said market building, and hereby expressly waives and relinquishes the right to repeal the vacation of said portions of said streets, and the Council of the City agrees not to exercise or attempt to exercise such right of repeal.

5. The Company shall pave and gravel the driveways on the east and north sides of the said building, in accordance with the plans and specifications of the City Engineer, heretofore prepared.

6. Upon the completion by the Company of its obligations under this agreement, and at the time of the tender by the Company to the City of proper conveyances of said property and assignments of its leases, contracts and insurance policies affecting said premises, the City shall accept said conveyances and said assignments and shall pay to the Company the sum of $1,244,790.66; and as of the date of said conveyances and assignments and of the making of said payment by the City to the Company, there shall be an accounting between the City and the Company, and the Company shall pay to the City all prepayments of rent and pro rata shares of premiums and deposits based upon the unexpired portion of existing leases and all prepayments of other moneys under existing contracts which shall represent unearned income of the Company, and the City shall

pay to the Company all prepaid expenses which the Company has at that time advanced under the terms of its existing contracts. In addition to the principal sum of $1,244,790.66 hereinabove mentioned, and at the time provided for the payment of said sum, the City shall also reimburse the Company in the full amount of the cash advanced and/or liability incurred by the Company in the purchase of the equipment, materials and supplies described in Exhibit "B", and shall pay to the Company, in addition thereto, ten per cent (10%) of the purchase price of said equipment, materials and supplies to cover the services of the Company in making said purchases. Such purchases of materials, equipment and supplies shall be subject to the approval of the Council in all respects, including the price paid therefor. All payments due from the City to the Company hereunder, if unpaid to the Company when due, shall thereafter bear interest at the rate of six per cent (6%) per annum, payable quarter-annually.

7. The City shall have the right during the life of this contract, and at any time prior to the conveyance to the City by the Company of the property herein described, to require any alterations, additions or changes to be made in the plans and/or specifications of the market building and in the equipment, materials and supplies to be furnished, but such right shall be exercised only by instructions, in writing delivered by the City to the Company, and at the time of

the conveyances herein provided to be made by the Company to the City of the property herein described, the City shall pay to the Company, or the Company shall pay to the City, the cost plus fifteen per cent (15%) of all such alterations, additions or changes.

8. From the date of the execution and delivery of this agreement until completion of its other obligations herein set forth, the Company agrees that it will perform leasing service for the procuring of tenants for said public market building, the identity of such tenants and the terms and conditions of their tenancy to be subject to the approval of the City, through its Council, and agrees that before the City acquires said public market building it shall be so occupied as to be a going public market utility. At the time of the transfer of the property hereinbefore described, the City shall pay to the Company for said leasing service, in addition to the other payments provided for in this contract, ten per cent (10%) of the gross revenue derived from rental, plus bonuses and premiums, if any, figured on an annual basis, regardless of whether or not the same be reserved on an annual basis, which are reserved to the City under the leases and/or rental arrangements so procured by the Company, if any. Such percentage shall not be applicable, however, to space, if any, reserved by the City for municipal operation of any concession or privilege, and with respect to revenues thus derived the City shall pay

to the Company at the end of thirty (30) days after completion of this contract, the City's first month's revenue derived thereunder. Neither shall said percentage be applicable to farmers' space, but with respect to revenues derived from farmers' space the City shall pay to the Company five per cent of the estimated first year's revenues, such estimate to be based on the revenues during the first month after the completion of the market.

IN WITNESS WHEREOF, said PUBLIC MARKET COMPANY OF PORTLAND has caused these presents to be executed in its corporate name by its President or Vice-President, and Secretary or Assistant-Secretary, thereunto duly authorized, and its corporate seal to be hereunto affixed, and the said CITY OF PORTLAND has caused these presents to be executed by its Mayor, attested by its Auditor, pursuant to authority duly given under the terms of Ordinance No. 61566 of the City of Portland, enacted on the 10th day of October, 1931, and effective on the 10th day of October, 1931, and Resolution No. 20291, adopted October 28, 1931.

Supreme Court

of the United States

OCTOBER TERM, 1946

No. 770

THE CITY OF PORTLAND, a Municipal Corporation,

Petitioner, Appellant and Cross-Respondent below,

v.

PUBLIC MARKET COMPANY OF PORTLAND,

Respondent and Cross-Appellant below,

and

RECONSTRUCTION FINANCE CORPORATION and THE FIRST NATIONAL BANK OF PORTLAND (OREGON),

Respondents and Cross-Appellants below.

REPLY BRIEF

JAY BOWERMAN,
LYMAN R. LATOURETTE,
Counsel for Petitioner,
MARIAN C. RUSHING,
Of Counsel for Petitioner,
Address, City Hall, Portland 4, Oregon.

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REVIEW OF RESPONDENTS' BRIEF

On page 2 it is said that the "public market building had been constructed according to the city's specifications." This statement if true is far-reaching, because it leads to a false thought that it was a special purpose building suited only for municipal use and therefore that the company when unable to compel the city to take and pay for the property,

should be given damages equalling the amount of difference between the contract price and the market value of the property, and that the city should not be heard to say that it had no power to raise the money to make payment. In reality this thought has no place in the case (1) because there is no allegation of estoppel against the city in respondents' pleadings, and (2) because such allegation if made would be futile inasmuch as a government body is never estopped from showing matters ultra vires.

The statement is not true. The facts are that when the city became interested in acquiring an off-street market operation in place of the Carroll Public Market, it received proposals from several owners; that the city appoint a committee to consider the building plans of the proponents; that upon examining the company's building plan it was found fatally defective in that it violated an easement which prevented the proposed building from being so close to the harbor wall along the west side of the Willamette River unless the footings were carried to a depth equal to or exceeding the depth of the wall footings; that the plans failed to show such depth of building footings; that such violation might cause both wall and building to fail; that a conference was held between the city's structural engineers and the company's president with the result that the company concluded to narrow the building rather than incur the expense of putting the footings down to the required depth;

that this conclusion was approved by the city's committee although it entailed much changing in the plans from top to bottom of the building; that some other suggested changes were made by members of the city's committee having to do especially with the parking space for motor vehicles, refrigerating space and towers; that the company adopted the suggestions without argument, although these changes involved an additional cost of approximately $100,000.00 but at the same time the committee suggested other changes (especially the cement ratio) whereby a saving of $112,-000.00 could be made; (W T 777-781; 799-817) that the company had its own architects draw the plans to incorporate the changes; that both sets of plans are in evidence and show that they were drawn by the same architects; that by comparison, the details of the changes can be seen (see Ex. 12A and 12B; W Ex. 16A and 16B); that all this happened before the contract was drawn, and the contract, when drawn, incorporated the revised plans rather than the original plans; that the building thus constructed is as well adapted to a market under private control as under municipal control, and that the building, although planned for a market operation, is well adapted to other uses. (C T 650, 653, 658-668 and 699.) Although there is conflict of evidence on the two points last mentioned, the great weight of evidence, including that of market experts, is that the location and the building were suitable either for a market under private or under municipal ownership (CT 1133-

1158; and C Ex. 1 pp. 39-42 and 65-69). For testimony pro and con re suitability of building for other uses (see CT 110-529; 539-557; 648-1089).

The evidence shows that during the war period the building was used by the Navy for storage and distributing purposes (CT 171, 191), and we think the court may take judicial notice (in view of the amount of publicity given) that, since the war, the building has been sold for use in printing and publishing a daily newspaper. The company is therefore not in the least entitled to a feeling of sympathy because the city was unable to pay for and acquire the property.

After construction began an important change was sought by the company. This related to the heating system which, according to the contract, plans and specifications, was by radiators and pipes intended to connect with a heating plant operated by a utility company. The Market Company found that the pipe line of the utility company was at such distance that the cost of connection would be somewhat burdensome. The company therefore sought approval from the city to a modification of plans so as to provide additional basement area and install a heating plant. This proposed alteration in turn caused other alterations. The City never agreed to the proposed change. Nevertheless, the Company proceeded to install the plant without City

approval, and this added a cost of $17,900.00. (WT 673; Ex. 61 Cert. 30.)

Many minor changes were made during construction, substantially all of which were approved by the City Council. However, there were many things which were listed as building changes which were equipment. (WT 160, 163, 167, 170-174.) They therefore needed council approval only as purchases of equipment. Neither these items nor any of the other items of equipment received council approval for the reason that the company neglected to submit them until after the company had opened and operated the market for several months, found it unprofitable, changed its views about retaining the property as a private enterprise and concluded to force the city to pay the contract price, including the cost of heating plant, building alterations, equipment, materials and supplies, and 10% for making the purchases and 10% of one year's rent for obtaining tenants (CT 1-129; 1237-1243). All of these matters lacked City approval because the Company neglected to give suitable information for action (CT 1-129; 1237-1243).

On page 2 of respondents' brief and elsewhere phrases appear like these, "The City *obligated itself* to accept the property as so improved and to pay a stated price plus certain additions," the city's "obligation to create the special fund;" the City being "guilty of a deliberate repudiation of its *obligations under the contract,*" "nonperformance by the

city in repudiating any and all *obligations under the contract,"* (Res. Brief pp. 3, 5, 6, 8, 10, 12, 13, 14, 15, etc.)

These phrases carry the inference that the city agreed to actually sell the revenue bonds and pay the company and therefore that the judgment for damages is for breach of contract,—ex contractu rather than ex delicto. The contract is printed in full on pages 65-74 of the petition. It contains no covenant that the city will in fact sell the certificates and make payment. It would be void if it contained such provision, for a covenant of this kind would be substantially the same as a direct covenant to pay the money. It would be a violation of the restrictions on the city's power to contract indebtedness.

Although respondents' brief and also the Supreme Court opinions have used language showing confusion of thought, the only theory that can be followed is the theory of damages ex delicto,—separate and distinct from an obligation created by contract, and therefore, theoretically at least, not subject to the restrictions on indebtedness. We think, however, and respectfully maintain, as indicated in the brief accompanying the petition, that public policy as disclosed by the present statute, charter and constitutional provisions, require that the courts no longer follow the ex delicto theory of the local improvement cases. The contractor would then put pressure on the recreant public officer and take mandamus or other suitable action. Only by so doing can tax payers

be protected against raids on public money by designing contractors and by negligent public officials. Only by so doing can the budget law be successfully followed.

Neither counsel for the respondents nor the Supreme Court of Oregon have directly asserted that the theory applied in this case was damages ex contractu rather than damages ex delicto.

Respondents at pages 7 and 29 of their brief mention the fact that the city filed no petition for rehearing after the opinion on appeal from the decree of Judge Wilson, and seem to infer that the city acquiesced. It did not acquiesce. Manifestly a petition for rehearing would have been futile. The city certainly lost no right by not filing such petition. The only thing that the city could reasonably do was to wait for the mandate to the Circuit Court, and then, upon a trial in accordance with the Supreme Court's opinion, seek to prove that the property was worth as much as the contract price (in consequence of which there could be no damage assessed against the city) and at the same time assert the lack of jurisdiction in the Supreme Court to convert the case from equity for specific performance to tort for negligence, set up the city's right under the Federal Constitution and offer proof to show that failure of payment was caused by negligence of the company rather than by negligence of the City.

The case was not ripe for a petition to this court for

certiorari until after the mandate, a new trial in the lower court and final action by the Supreme Court (Schlosser v. Hemhill, 198 U. S. 173, 49 L. ed. 1001 and Footnote; Detroit & M. R. Co. v. Michigan R. Com., 240 U. S. 564, 60 L. ed. 802 and cases in Note on page 803).

The city followed that course. In addition it offered evidence in the trial court showing adequately, as we think, that the company's negligent acts rather than any negligence on the part of the city caused the project to fail. The trial court expressed itself as being restricted by the directions of the Supreme Court, refused to give more than slight consideration to any of this evidence, rejected much of it and rendered a large judgment for damages against the city.

Our point here is that *the city has not had its day in court* on the subject of negligence and liability ex delicto to pay damages. The city has been presented with no complaint containing allegations specifically or at all charging it with negligence in this regard. It has had no fair hearing on the subject of negligence.

Respondents, on page 5 of their brief, refer to pages 12 and 13 of the city's petition as intimating that the case was dismissed by Judge Wilson "because the Market Company failed to amend its complaint to plead damages for breach of a special fund contract" and this is stated as contrary to the fact. Such intimation, however, was not intended for Judge Wilson entered a decree of dismisal because he con-

cluded that the contract created no general obligation and that the company had failed to perform its part of the contract in the matter of making the property a going public market utility in consequence of which a further amendment of the complaint, if otherwise permissible, would be futile.

Respondents mention the fact on page 9, that at the trial before Judge Crawford witnesses in behalf of the city "testified that the proposed security issue would not have been salable, and assert that the trial court held this evidence insufficient to show that the city would not have succeeded in financing the project in the manner contemplated had it made a bona fide and sustained effort to do so." What Judge Crawford actually said was, "There had been no satisfactory showing that with a bona fide and sustained effort upon the part of the city *and all interested*, the certificates could not have been satisfactorily disposed of *within a reasonable time.*" (Page 227, Resp. Brief on appeal from Judge Crawford's decree.)

This statement followed closely the statement at page 226 that "this court is restricted in its inquiry to the matters clearly remanded to it, that is, the ascertainment of the contract price and the value, the difference being the damages if any."

At page 13 respondents assert that the city is contending for "another hearing upon the question whether it was at fault or 'negligent'." Respondents are far afield. They well

know that the city has been adjudged guilty of negligence without prior charge of negligence and without a hearing on such charge. A judgment of $1,135,676.07 has been entered against the city on the theory of negligence, although the city has had no day in court on that subject. An examination of the briefs before the Supreme Court of Oregon on appeal from the decree of Judge Wilson (and these briefs are now before this court by stipulation) will show that the major part of the controversy concerned the interpretation of the contract as creating a general obligation on the part of the city, the extent of the city's indebtedness as compared to the debt limitation, the extent of the city's annual tax levy necessary for municipal government as compared with its tax levying restriction, the effect of the budget law and power of the state board (State Tax Supervising and Conservation Commission) to eliminate proposed expenditures, all of which would render the contract void if interpreted as creating a general obligation. Other grounds for denying specific performance were that the evidence showed that there was no clear meeting of the minds on the point that the city assume a general obligation if the contract be thought to impose a general obligation on the city; that the company's conduct was not exemplary so as to move the court to grant specific performance, if the company were found otherwise entitled to specific performance; that the company had not fully performed the contract on its part and was, therefore, in no position to claim specific per-

formance on the part of the city; that the city could not pay the amount of the contract price even if it had assumed a general obligation and this was because it had no borrowing power, no tax leving power and no means of selling utility certificates.

As to the last point it was maintained also that the certificates could not have been sold even if the city had had power to make a proper mortgage and issue the certificates. The company's brief made no claim that the second amended complaint included a charge of negligence against the city or allegations on which to claim damages ex delicto. It did claim, however, as it claimed in argument and brief before Judge Wilson after his first opinion, that the company had fully performed its part of the contract; that the court should, therefore, go further and determine what relief should be afforded and that relief should be applied as in street improvement cases, a money judgment for damages ex delicto for the full amount of the contract price. The city's brief in the Supreme Court contested this theory as not applicable because the case had not been tried on such theory; that there had been no allegations of negligence; that the trial court, after the case had been tried and decided, had no power to reopen the case, allow the plaintiff to file another amended complaint, make charges of negligence and then proceed to another trial; that the Supreme Court, being a court of review and not one of original juris-

diction, had no greater power (nor as much in this particular), as the trial court and that in any event such procedure would be futile inasmuch as the evidence then before the court disclosed that the company had not fully performed its part of the contract in that the contract by its wording and by the very necessity of the case required that the property be a going public utility to such extent that the certificates would be marketable, whereas the evidence showed that they would not be marketable. (See p. 555 et seq. of Respondents' Brief on said appeal.)

The Supreme Court said that the way for the city to have shown that they were not marketable was to have issued the certificates and offered them for sale, referring here to an old Kentucky case (Denny v. Campbell's Ex'rs, 9 Ky. Law 367) which had been later explained in a way to make it not applicable because of a statute (See Owens v. Kurd, 192 Ky. 146). The court at the same time said that a decree of specific performance in this particular (to require the city to offer the certificates for sale) could not be made in view of changed conditions and loss of interest on the part of the city in having a public market.

The court ignored the facts that *nine* years of litigation had been spent in determining whether the city had assumed a general obligation; that the alleged tender of title papers was made on the basis that the city had assumed a general obligation and was required to make payment before re-

ceiving the title papers; that the city could not issue the certificates without having a clear title to the property and making a trust mortgage to secure them. Yet, the court, without any amendment of the pleadings and without any trial on the subject of negligence, declared that the company had fully performed; that it was entitled to relief; that the relief should be on the theory of the local improvement cases except that the company would be permitted to keep the property and hold the city in damages for such amount as the contract price exceeded the reasonable value of the property, and that, since the evidence before the court was insufficient to show either the reasonable value of the property or the exact contract price the case should be remanded for the Circuit Court to take further evidence to show the value and the contract price, and that *the parties would be allowed to amend their pleadings.*

Counsel for the city were baffled by a situation like that. In view of the provision for amending the pleadings the city's counsel were inclined to interpret the statements concerning the city's liability as not intended as an adjudication,—but if so intended, they were necessarily void because beyond the jurisdiction of the court and in violation of the Federal Constitution. Thus it came about that when the case, after a further period of seven months, was remanded to the trial court and the plaintiff filed a third amended complaint, the city filed an answer setting up its

grounds of defense and showing that it had not theretofore had its day in court; that the opinion of the Supreme Court in regard to the company's remedy was advisory rather than law of the case and that if taken as an adjudication it was void and violated the 14th Amendment of the Federal Constitution. The trial court, on the contrary, held that the defenses set up by the city were immaterial except in so far as they went to the amount of the contract price and the value of the property, and the Supreme Court later affirmed the action of the trial court. Thus it is that the city has not had a day in court and the Federal Constitution has been violated.

Respondents' brief at another place on page 13 asserts that performance by the city "as the contract was finally interpreted by the Oregon Supreme Court, meant *simply a good faith effort* to finance the project through *an issue of securities* and the use of the fund thus raised in the purchase of the property."

This statement ignores the lapse of more than nine years of litigation to defeat the company's unwarranted contention that the city had assumed a general obligation; it ignores the facts above shown that the company never enabled the city to make the mortgage and issue the certificates by making a delivery of title papers or indicating a willingness to enter into an escrow arrangement whereby the city could have made the mortgage and issued the certificates. It

ignores the facts that the company put no one in charge who was an experienced manager in operating a large market project; that it had paid such high overhead salaries and managed the business so negligently that it was known and publicly referred to as "one of the biggest flops there was" and as "a racket". (S Ex. 6, p. 8, W Ex. 48, TW 113; B pp. 258, 259, 261). How then could the city in good faith finance the project through an issue of securities?

Respondents' brief on page 14 contains an assertion that "to imply that the city was ready and willing to perform and that performance was prevented by acts or omissions of the Market Company, *evades the truth.*" No citation of evidence or authority is submitted by respondents as in support of this assertion. On the contrary, the evidence offered on the subject of negligence before Judge Crawford shows that the city was willing to issue and sell the certificates if able to do so; that Earl Riley, then city commissioner and later Mayor, kept in touch with market conditions and found that they would not be marketable if issued; that he, although never favorable to a municipal project like that embraced in the contract, was nevertheless willing to carry out whatever obligation the city was under; that the new Mayor, Joseph K. Carson, Jr., who succeeded George L. Baker, was favorably disposed toward the project although he did not think that the city was under any legal obligation to take over the property; that Ormond R. Bean,

a new commissioner, was not unfavorable to the company; that none of the commissioners had taken an objectionable attitude toward the company except one; that the Council had passed an emergency ordinance to allow certain building alterations; that the Council's Market Committee and the Council itself promptly passed upon all applications for alterations which were made with proper supporting data; that they were ready to pass upon leases, purchases of materials and supplies when furnished proper data for action; that Commissioner Bean, who had succeeded Commissioner Barbur, was as favorable toward the market project as was his predecessor; that the new Mayor, after a consultation with other members of the Council, promptly sent a man to the market to observe operations and be ready to take over in behalf of the city as soon as the company became ready to make delivery; that this man was continued in that capacity for a period of some six months and until the company itself (which had commenced the market operation on December 15, 1933), employed this man and made him Market Manager under its own operation although he had had no tutelage under an experienced manager. The truth is that the certificates could not be issued or sold under the circumstances; that the city was always ready and willing to obtain the market if it could be obtained on the program provided therefor; that the company reneged on that program and engaged the city in a long litigation in an effort to make the city pay as upon a general

obligation; that the company neglected to furnish the city data whereby it could intelligently pass upon the purchase of equipment (one considerable item of which was a sugar mill which on its face was of doubtful propriety); that it neglected to furnish the city proper data for passing upon and approving leases; that it neglected to give the city possession or to offer title papers on a basis which would permit the city to issue utility certificates. (TW 1001-1005; 1008-1010; B 260, 262; TC 136.)

The acts of the company in demanding payment as upon a general obligation was a repudiation of the contract on its part and fully warranted the Council in subsequently repudiating the contract in toto if the action of the Council in rejecting the company's "offer" of title papers may be so interpreted.

The statement on page 14 of respondents' brief that "the city deliberately embarked on a course of repudiation of the contract long before the Market Company tendered the property" is untrue in fact and unsupported by the evidence in the case, as is above shown.

The theory advanced on page 16 that "the complaint invoked the equitable powers of the court to grant whatever relief might be found appropriate if, for any reason, specific performance could not be decreed," is at once challenged. The complaint (~~third~~ 2nd amended) on which the case came to trial before Judge Wilson may be searched in

vain for allegations furnishing a basis for relief like that which the company was seeking. The theory on which it was based is wholly foreign to the theory of negligence ex delicto which the Supreme Court adopted without any change of pleadings and which the Supreme Court proceeded to use as a basis for adjudging the city guilty of negligence, holding it liable in damages and fixing the basis for assessing the damages.

The ~~third~~ 2nd amended complaint was definite and positive in its demand for specific performance by a general obligation judgment against the city. The prayer is that upon the accounting "a decree shall be entered directing defendant City of Portland to pay to defendant Reconstruction Finance Corporation and to plaintiff the amounts ascertained to be due them respectfully," and "that a judgment be entered against defendant City of Portland for the amounts due from it, with interest from the due date of each item" (see pages 18 and 19 of Appellant's Abst. of Rec. on appeal from Judge Wilson's decree). It is true that the prayer asks for "such other and further relief in the premises as to the court shall seem proper * * *," but a prayer of this kind is insufficient to carry relief beyond, or in contradiction of, the allegations and theory of the complaint. (Allen v. Pullman Palace Car Company, 139 U. S. 658, 662; 35 L. ed. 303, 304; 11 S. Ct. 682; 30 C. J. S. 671 "Equity" sec. 215, Note 94.)

On page 17 respondents refer to the dissenting opinion

(page 195 of 160 Or.) when this case was before the court on a demurrer to the sufficiency of the complaint. This opinion, however, does not support the language used by respondents' counsel. It reads thus:

> "Whether or not the plaintiff is entitled to require the city to perform specifically the terms of the contract by proceeding to sell or attempting to sell the public market utility certificates, *or has a right to relief by way of mandamus or some other proceeding, it is not necessary at this time to determine.*"

On page 18 a reference is made to the city's answering brief on appeal from Judge Wilson's decree as being inconsistent. A reading of the brief, however, will fail to show inconsistency. The City of Portland has long been familiar with the ex delicto theory of municipal liability under local assessment proceedings. It has regarded that theory as established in the law of the state in cases where actual negligence is shown on the part of city officials in making and collecting a local assessment for a street improvement. The city's brief at the places mentioned shows, however, that those cases are in tort and that no recovery can be had by the contractor if negligence of the contractor caused a failure of the assessment or if the city officers were not in fact negligent although the fund has not been created (Caruthers v. Astoria, 72 Or. 505, 513; Newberg v. Warren Construction Co., 130 Or. 64, 66).

Other portions of respondents' brief might be answered

in detail but the above seem sufficient to show that the respondents have failed to show that the city has had its day in court as required by the Federal Constitution in so far as the case in its final stage embraced the subject of damages ex delicto.

SUMMARY AND CONCLUSIONS

As a brief summary we submit the following observations:

This case was brought by the Company as a suit in equity for the recovery of a money judgment representing the contract price of the City Market property in Portland.

The Company had acquired this property and secured the vacation of two street ends in order to consolidate three holdings into the one tract described in the complaint, for the purpose of developing and operating a public market.

The Company substantially completed the building and commenced the operation of a public market about December 15, 1933.

The Company operated this public market enterprise with a wholly inexperienced manager at a salary of $800 per month and an equally inexperienced secretary at a salary of $300 per month.

By June 30, 1934, according to the audit made by RFC, the Company showed an operating loss of $11,000 per

month for this period. It continued to operate this market as a losing enterprise until November, 1934, at which time, having demonstrated that the operation was a losing enterprise, it went through the form of making a tender and a demand for the full purchase price. It made no provision for giving security for the utility bonds, and, so far as it lay within its power, it made it impossible for the City to sell the bonds.

It not only had operated the market enterprise at a loss, but it needlessly increased this loss by employing and overpaying incompetent executives. The Company sold its 6% first mortgage bonds to RFC at a 6½% discount. During its period of operation it permitted the interest on these bonds to go into default, and the RFC reduced the interest from 6% to 4%. These factors, of course, all contributed to the ultimate result that the market securities were unsalable.

The sale of these securities at not less than 95% of par (as required by statute, Oregon Compiled Laws Annotated, Sec. 95-1603) was the only source out of which the City could have procured the funds with which to purchase the Market.

In this suit for specific performance, which was changed into an action for damages, the City has been denied any opportunity to have this case tried and decided upon its merits. By the method which the Supreme Court of Oregon

followed, it fixed liability and limited further inquiry to the difference between the contract price and the market value of the property.

Judge Crawford followed the directions of the Supreme Court and disregarded the City's evidence which would have disclosed that no damage was allowable and that the results complained of by the Company were attributable solely to the Company's own negligence and wrongdoing.

Conclusions:

The peculiar and unusual nature of this case and its far-reaching effects if not reversed by this court will open the door for a method of circumventing the 14th Amendment of the Federal Constitution as it applies to the right of a day in court and fair trial. These rights are two of the most precious rights that a civilized people have. They should be preserved inviolable and this court is the last court to which resort can be had for upholding and preserving them.

In the foregoing pages and the brief pteviously submitted we have briefly called attention to some of the outstanding facts which have been presented with the hope of showing a prima facie case that the City of Portland has experienced a very grievous injury because of a violation of its constitutional rights,—a judgment in damages approaching one and a quarter million dollars, and a precedent

(if permitted to stand) will have been established whereby other millions of dollars may be imposed upon this city and other cities unjustly and unfairly and notwithstanding constitutional, charter and statutory restrictions on public expenditures of money and the incurring of indebtedness. Cities and all governmental authorities throughout the United States are affected.

It is respectfully urged that the writ of certiorari be issued to the end that the case may be fully heard on its merits and that suitable action be taken to uphold the constitutional right to a day in court and a fair trial.

Respectfully submitted,

JAY BOWERMAN,
LYMAN E. LATOURETTE,
Counsel for Petitioner.

MARIAN C. RUSHING,
Of Counsel for Petitioner.

INDEX

CITATIONS

730291—47——1

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 770

THE CITY OF PORTLAND, A MUNICIPAL CORPORATION, PETITIONER

v.

PUBLIC MARKET COMPANY OF PORTLAND AND RECONSTRUCTION FINANCE CORPORATION AND THE FIRST NATIONAL BANK OF PORTLAND (OREGON)

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

BRIEF FOR THE RECONSTRUCTION FINANCE CORPORATION AND THE FIRST NATIONAL BANK OF PORTLAND (OREGON) IN OPPOSITION

OPINIONS BELOW

The opinion of the court below is reported in 170 P. 2d 586. The previous decisions of the court below in the same case are reported in 160 Or. 155 and 171 Or. 522.

JURISDICTION

The judgment of the Supreme Court of Oregon was entered on June 25, 1946. A petition for re-

hearing was filed on August 20, 1946, within the time for such filing as extended. This petition was denied on September 10, 1946. The petition for a writ of certiorari was filed on December 10, 1946. The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether petitioner's right to due process was infringed by application of the law of the case, as determined on a former appeal, or by the exercise of the court below of its jurisdiction to determine issues not previously passed upon by the trial court.

STATUTES INVOLVED

Sections 9–202 and 10–810, of the Oregon Code are set forth in the Appendix, *infra*, pp. 21–23.

STATEMENT

In 1931, the petitioner entered into a contract with Public Market Company of Portland for the purchase of a public market building to be erected by the Market Company according to plans approved by the City. In 1933, the Reconstruction Finance Corporation provided funds for the erection of the building, taking as security for the Market Company's bonds a mortgage and an assignment of the Market Company's contract with the City. The building was completed in

1934. The City then rejected a tender of conveyance by the Market Company and repudiated the contract. (171 Or. 587, 589, 590, 170 P. 2d 588, 589, 591–594.)

The present suit was commenced in 1935 by the Market Company against the City, the Reconstruction Finance Corporation and its bond-trustee (the First National Bank of Portland, Oregon) being joined as defendants. The complaint has at all times set forth the contract in full, and prayed for an accounting, specific performance, and general equitable relief. From the first, the legal effect of the contract was in dispute between the parties, the City contending that it imposed only a conditional or "special-fund" obligation (i. e., an obligation to pay for the market only out of the proceeds of income bonds designated as "utility certificates") and the Market Company contending that the contract created a general obligation on the part of the City.

The trial court sustained a demurrer to the second amended complaint, and appeal was taken to the Supreme Court of Oregon, which, in an opinion reported in 160 Or. 155, reversed the trial court, holding (1) that the contract on its face expressed a general obligation, (2) that if the contract should be determined to create only a special-fund obligation, the second amended complaint nevertheless stated a good cause of action for equitable relief and should be enforced *in this*

action (point 11, 160 Or. 166, 167, *et seq.*). The case came on for trial before the Circuit Court of Multnomah County, Oregon, which held: (1) that the contract created only a special-fund obligation, and (2) that the contract had not been performed by the Market Company. Judgment was thereupon entered in favor of the City, and a second appeal was taken to the Supreme Court of Oregon. On the second appeal, the decision of the trial court was again reversed, the Supreme Court holding (1) that the contract created only a special-fund obligation, (2) that the contract had been fully performed by the Market Company, (3) that it had been breached and repudiated by the City, (4) that equity was competent to grant relief in the present suit, (5) that specific performance was impracticable, and (6) that, in lieu of specific performance, the Market Company was entitled to recover an amount equal to the contract price, less the market value of the property at date of breach. (171 Or. 522.)

No rehearing was sought by the City. Upon remand, the case was tried in the Circuit Court on a third amended complaint which added further allegations that the City had failed to take steps to create a fund through sale of utility certificates, and had repudiated the contract, that the value of the property at date of breach was not in excess of $550,000, and that if the remedy of specific performance should not be available,

plaintiff would have suffered damages in an amount equal to the total amount payable under the contract, less the value of the property at the time of the breach and repudiation by the City in 1934. This complaint contained an additional prayer that in the event specific performance should be denied, plaintiff should recover judgment in an amount equal to the purchase price, less the fair value of the property rejected by the City, with interest thereon. (Abstract, Third Appeal, 1944, pp. 17–22.) The City repeated the defenses theretofore pleaded, and added allegations to the effect that the value of the property in 1934 was in excess of the amount to be paid under the contract, that public utility certificates could not have been sold for a price in excess of thirty cents on the dollar, that, owing to plaintiff's incompetent operation of the market, such certificates could not have been sold on or after November 14, 1934 for a price in excess of twenty cents on the dollar, and that the City had not theretofore had an opportunity to plead these matters, and would be denied the equal protection of the laws and deprived of its property without due process of law if not permitted to make such defense. (Abstract, Third Appeal, 1944, pp. 49, 68.)

Upon the second trial in the Circuit Court, that Court ruled that the opinion of the Supreme Court of Oregon, rendered on the second appeal,

constituted the law of the case with respect to the measure of damages, but received and transmitted to the appellate court all evidence offered by the City.

On the third appeal, the Supreme Court of Oregon (1) held that the Circuit Court was correct in treating the decision on the second appeal as the law of the case with respect to the remedy to be granted and the measure of damages, (2) heard the case de novo as required by Oregon Code, Sec. 10-810, and (3) entered judgment in favor of the Market Company in an amount in excess of that of the judgment rendered in the court below. (170 P. 2d 586.)

ARGUMENT

After nearly twelve years of litigation, two extended trials, and three appeals to the Supreme Court of Oregon, all with respect to the determination and enforcement of the liability of the petitioner arising from its nonperformance and repudiation of a written contract, petitioner seeks certiorari from this Court on the ground that it has been denied a day in court with respect to the measure of its liability.

1. The petition appears to be based on a misconception of the purpose and effect of the Fourteenth Amendment. Passing the serious question as to the right of a municipal corporation to invoke the Fourteenth Amendment against action by the State of which it is a creature (see *Williams*

v. *Mayor*, 289 U. S. 36, 40, and cases cited), the petitioner does not deny that it has had full opportunity to present in the Supreme Court of Oregon all possible issues in connection with the measure of its liability under the contract. What petitioner claims is that issues which, under the decision of the court below on the first appeal, should have been, but were not, passed upon by the trial court, were passed upon by the Supreme Court of Oregon on the second appeal, and were erroneously held to have become the law of the case (Pet. 30).

Plainly, no constitutional requirement prevents a State from providing that, upon appeal, equity causes shall be heard anew by the Supreme Court of the State, and that the decision of that court on all non-federal questions, whether or not theretofore passed upon by a lower court, shall be final. The court below has indicated (170 P. 2d at 591) that in passing upon the issue which had not been determined by the Circuit Court, it acted pursuant to Section 10–810 of the Oregon Code, (Appendix, *infra*, p. 23), and has held that under that statute the Supreme Court of the State possessed jurisdiction to determine on the second appeal all phases of the case, including the question of the measure of the City's liability under a special-fund obligation. The decision of the highest court of the State with respect to the legal effect of a State statute regulating the jurisdiction of State courts not being subject to review

by this Court, it follows that the correctness of the decision of the court below in this regard presents no federal question.

2. The petitioner's further contention (Pet. 30) appears to be that before the decision on the second appeal (171 Or. 522) the suit did not involve consideration of the respective rights and liabilities of the parties if the contract should be construed as creating only a "special-fund" obligation, and that determination of the extent of the City's liability under a "special-fund" contract did not come into the case until the third amended complaint was filed. Some due process infirmity is sought to be drawn from these alleged facts, but the record and the City's briefs as presented in the court below, show the factual inaccuracy of the petitioner's claim.

That the Market Company's rights under a special obligation contract, dependent upon the issuance of "utility certificates," were considered by the City to be in issue under the pleadings as they stood on the first and second appeals, is disclosed in the City's argument in support of its petition for rehearing on the first appeal. The City, referring to the second amended complaint, says (pp. 1 and 2):

> The theory of respondent, City of Portland, is that the last amended complaint fails to state sufficient facts * * * (2) because there is no allegation showing

> that the special fund from which payment is to be made is created, and (3) because a court will not take jurisdiction to grant specific performance where (as here, in case of selling utility certificates) a supervision of performance requires an exercise of administrative judgment and discretion.

Here the City recognized as early as 1938 that the purpose and effect of the second amended complaint was to pray for specific performance of the contract, if the contract should be held to constitute a "special fund" rather than a general obligation of the City, as well as for specific performance if the contract should be construed as constituting a general obligation of the City. That the second amended complaint has always been construed by the City as seeking specific performance of the contract, if the contract should be construed as a "special fund" obligation, is again made clear on page 44 of the same brief, where the City says:

> * * * if the contract be construed as a contract to be paid only from a sale of utility certificates, jurisdiction should not be taken, in view of the necessary details and administrative judgment in advertising for and obtaining bids and making an award thereon.

The Transcript of Record on the first appeal (1936) shows that the prayer of the original complaint asked that the City be ordered to do all things necessary in order to permit payment of

the purchase price. The City's brief on that appeal (pp. 63, 64) calls attention to this, as indicating that the Market Company, at the outset of the suit, interpreted the contract as a special-fund obligation.

If relief under a special-obligation contract was not within the issues, the "street improvement cases" referred to by the court below could have had no relevance. It is stated, however, in the opinion of that court on the last appeal (170 P. 2d at 590), that the City, in its argument of the second appeal, while at one point disputing the applicability of the so-called local improvement cases (though not that their applicability was in issue) at another point conceded in its brief the applicability of such cases, saying:

> It is not true that the city was "free to defer indefinitely the creation of the fund." The City's officers had a definite duty to perform under penalty of suffering a general obligation liability against the City. This duty was to act with a reasonable degree of diligence in the matter of selling the certificates and creating the fund, just as in the case of street improvements to be paid for by a special fund to be raised by an assessment against the property benefited. The city's officers have the duty to act with reasonable diligence in the matter of making a valid assessment, and, if possible, selling the property if the owners fail to pay.

In remanding the case to the Circuit Court on the first appeal, even the judges who concurred in holding that the complaint created only a special-fund obligation held (160 Or. 195) that the case should be remanded "in order to determine whether or not the plaintiff has fully performed its part of the contract and *to ascertain what relief if any should be granted the plaintiff.*" The majority opinion, which interpreted the contract as on its face creating a general obligation, also directed trial of that issue. (160 Or. 166, 167.) The Circuit Court, on the first trial of the case before Judge Wilson, failed to pass on this question. On the ensuing appeal, the case was submitted to the court below on four assignments of error, of which the fourth was that the court below had erred in denying plaintiff such relief as might be appropriate to the City's breach of the Market contract, interpreted as a special or a limited-obligation contract. The briefs on that appeal show that this assignment of error was fully presented and argued by the Market Company and the Reconstruction Finance Corporation, and that they contended that because of changes in the situation resulting from the City's abandonment of the project, performance through the issuance of utility certificates had become impossible, and that if the contract were construed as a special-fund obligation, the City's default imposed liability upon the City for the full

amount of the purchase price under the rule of the local improvement cases, leaving upon the City the burden of salvaging any value remaining to the property. (Appellant's opening brief, Second Appeal, pp. 250–255). The Reconstruction Finance Corporation and the Market Company, in that argument, mentioned and answered the contention of the City, made at the trial, that securities of the type proposed were not salable at the time of the tender. The City's answering brief asserted that the claim for damages was not within the issues made by the pleadings, and contended at length that there was not liability because (1) the Market Company had not performed on its part, (2) the City was not negligent, and (3) the Market Company was not free of contributory negligence (Respt. Br. 2d Appeal, pp. 558–573). These are the very issues that the City now avers it had has no opportunity to assert.

Petitioner, claiming that new issues were injected into the case after the second appeal, sets forth certain defenses set up by the City in answer to the third amended complaint, and states (Petition, p. 15) that

> "The City had previously had no occasion to set up these matters," [i. e., that a price in excess of 30 cents on a dollar was not obtainable for the utility certificates, and that the negligence of the Market Company, in unskillfully operating the market, and

> the condition of the bond market, prevented sale of the certificates][1] "as a defense against the Company's previous claim."

This statement is in the teeth of the record (Paragraph 9 of the City's Answer, and Paragraphs XXII and XXV of the City's Separate Answer and Counterclaim, Appellant's Abstract of record on second appeal). The City contended, in the Second Appeal, (Appellant's Abstract of Record on second appeal, p. 46) that:

> * * * plaintiff has failed to complete its obligation under said contract in this, that it failed to have the market building therein referred to so occupied as to be a going public market utility within the terms and provisions of said contract * * *.

The city further asserted at this time that the plaintiff (*id.* at p. 85):

> * * * failed within a reasonable time thereafter to establish in said building a going public utility within the intent and meaning of the parties hereto so that public utility certificates might be issued and sold * * *.

And the City alleged, in defense (*id.* at p. 81):

> * * * that the plaintiff by its acts, prevented this defendant from receiving an

[1] The City mentions also its allegation that the property was worth the full purchase price at date of breach. As the city's evidence in that record was not excluded, this presents no issue here.

> approving legal opinion for the sale of said utility certificates and caused a sale thereof to become impossible * * *.

The City's present contention, that default on the part of the Market Company was the cause of the City's default, was asserted from the earliest stages of the suit. On page 35 of the City's argument in support of petition for rehearing of the first appeal, the City said:

> It is maintained by the City that the Company has failed thus far to have the market so occupied as to be a going public market utility, and that an attempt to sell the utility certificates would be ineffectual until this portion of the Company's obligations shall have been performed.

The opinion of the court below, which has heard the case on three appeals, makes it clear that there has been no change in the issues. The court states that (170 P. 2d at 591):

> As to the claim that new evidence and different legal principles have come into the case since the last reversal, it is sufficient to say that there is no new evidence of a different character than that which was before us on the former appeal, although there is some evidence that is cumulative of the old; and that what is urged as the application of new legal principles comes down at the last to a challenge of the rule of damages which we announced, or an attempt in a different guise to show

> that the plaintiff did not fully perform, notwithstanding that we have held to the contrary.
>
> We must, therefore, decline to inquire again into the question of the nature of the relief to which the plaintiff is entitled. And, since that question was fully presented on the former appeal, in the briefs and on the argument, and counsel for the city had ample opportunity to be heard upon it and were heard, there is no merit in the suggestion that the requirements of due process of law have not been met.

The petitioner's only proper basis of complaint is, therefore, not that the measure of the City's liability was not within the pleadings under the second amended complaint, as determined by the court below on the first appeal, and not that the City did not have a day in court on the issue of the measure of damages, but that the court below erred in interpreting the law of the State with respect to whether the rule of damages to be applied must first be determined by the Circuit Court rather than by the Supreme Court. This issue has already been discussed under Point 1.

A superficially plausible theory advanced by the petitioner is that because courts have, by a legal fiction, classified the recovery of indemnity for failure of municipal corporations to perform their obligations under special-fund contracts as "sounding in tort", therefore the enforcement of

an analogous remedy in this suit should be regarded as the substitution of a new cause of action. Petitioner, however, suggests no reason why the fact that some courts have classified such relief as "sounding in tort" requires that application of an equitable remedy for breach of a contract which the plaintiff has been duly adjudicated to have fully performed, and which the defendant has been duly adjudicated to have wrongfully breached, should, for constitutional purposes, be considered to constitute anything different from what it really is.

Petitioner, in its contention that the suit was metamorphosed into a tort action for negligence, misconceives the basis of the relief granted below, as well as the scope of the complaint. While at one point in its decision using the words "ex delicto," the court makes it indisputably clear that the recovery was granted as equitable relief for breach of the City's contractual obligation under the contract, set up in the complaint. The opinion on the second appeal squarely states that recovery is not based on "negligence" but on an intentional breach and repudiation of a contract (171 Or. at 590):

> * * * if the City was not guilty of negligence, it was guilty of something worse—an outright and unwarranted refusal to be bound by its lawful undertaking. Under the broad principle of which the local improvement cases *furnish an*

> *illustration,* negligence is not the touchstone, but the failure, whether intentional or otherwise, to use the diligence which "the contract itself imports". * * * The doctrine is, in truth, founded in common honesty and in the law's purpose *to prevent evasion of the obligations of a contract.* It governs the conduct of municipalities no less than others. [Italics supplied.]

No constitutional infirmity results when equitable relief cannot be decreed and damages as an alternative remedy are decided upon. Surely, the defendant in such a suit cannot hope to retry, in the determination of the damages recoverable, questions theretofore considered and decided.

Stated objectively, what the petitioner really complains of is that the court below, upon reaching the conclusion that the proper equitable remedy was a money judgment in the amount of the contract price, with credit to the City for the value of the property unjustly left in the Market Company's hands, did not remain silent as to what remedy equity should extend, and merely remand the case to a trial court for further hearing, instead of instructing the trial court in a manner sufficiently definite to permit prompt disposition of the case. Petitioner's theory appears to present no federal question, and would hobble appellate courts exercising statutory authority to review equity decisions de novo, and prevent such courts

from granting effective remedies without multiple appeals. See 170 P. 2d at 591.

It is familiar law (and was conceded in the City's brief in the last appeal to the court below, pp. 17–18) that a prayer for general relief, such as that contained in the 2nd amended complaint, on which the case was presented on the first two appeals, operates to enlarge or broaden the relief sought within that which the facts alleged in the bill show complainant has a right to ask, and that, under such a prayer, relief, different from that contained in the prayer, may be granted if justified by allegations and proof, and that "a prayer for general relief empowers the court to grant whatever relief the facts alleged and proved require, even to the granting of other and additional relief from that specially prayed for if supported by the allegations of the complaint or bill, and established by competent evidence." *Ibid.* Otherwise, such prayers would be futile. The relief granted was therefore available under the second amended complaint on which the case was heard on the second appeal, without further amendment of the pleadings.

3. The record shows that the court below considered and discussed in detail all issues presented with respect to any interference or responsibility of the Market Company affecting issuance of public utility certificates by the City. (170 P. 2d at 592–593.) In the last trial of the case in

the Circuit Court, petitioner offered, and the Court received under its equity rule, all evidence that the City desired to present regarding the causes of the City's refusal to perform its contract and the alleged nonperformance of the Market Company's obligations. This evidence was brought to the court below on the third appeal. After considering all such evidence, notwithstanding the Court's ruling that the decision on the second appeal constituted the law of the case, the court below stated (all judges concurring) that the new evidence did not justify a conclusion different from that expressed on the second appeal (170 P. 2d at 594):

> The charge now made that it was the conduct of the plaintiff which prevented the issuance and sale of public utility certificates is an after-thought; the truth is that the City's disregard of its duty was the result of its decision that it did not want the market building and did not wish to engage in the market business. We said in our former opinion, in speaking of this matter, that the City was guilty of "an outright and unwarranted refusal to be bound by its lawful undertaking." (171 Or. 590.) Not only is that statement the law of the case, but *nothing that has been called to our attention since it was made furnishes any ground for thinking that it was not just and correct.* [Italics supplied.]

Consequently, the City has been accorded an adequate hearing on this question and there is no basis for its assertion that it has been denied due process.

CONCLUSION

The court below having considered all evidence offered by the petitioner, no federal question is presented in that regard. It does not appear that petitioner has been deprived of any constitutional right. The petition for a writ of certiorari should be denied.

Respectfully submitted,

GEORGE T. WASHINGTON,
Acting Solicitor General.

JAMES L. DOUGHERTY,
General Counsel,
ROBERT C. GOODALE,
Counsel,
JERRY N. GRIFFIN,
Attorney,
Reconstruction Finance Corporation.

FEBRUARY, 1947.

APPENDIX

Oregon Compiled Laws, Code of Civil Procedure, Section 9–202

Issues of fact triable by court unless referred: Reference: Reduction to writing of testimony offered or taken: Findings. All issues of fact in suits in equity shall be tried by the court unless the same are referred to a referee pursuant to the provisions of section 4–304 of this code; provided, that in districts composed of no more than one county and having more than one judge of the circuit court, no cause shall be referred to a referee without the consent of all parties to such suit in writing filed in said cause, except in suits involving the examination of long and complicated accounts. If tried before the court, the evidence shall be presented, and at the request of any of the parties to such suit or if required by the court, reduced to writing, to be either in longhand or type, or in stenographic notes, which shall, when ordered by the court, be extended into longhand or type and filed with the clerk of the court in the cause. Where evidence is offered by any of the parties, and excluded by the ruling of the court, the party so offering the testimony shall be entitled to have the same taken down in like manner as the testimony admitted, but the same shall be marked and designated as evidence offered, excluded and excepted to. The party offering said testimony shall be required to pay

for taking such testimony so excluded, unless the court on appeal may hold the same was competent. Where the stenographic notes of the testimony are not required to be extended by any of the parties, or required by the court, they shall be filed in the cause. It shall not be necessary for the court, in equity suits, to make special findings of fact. If special findings are made, the court, in rendering its decision, shall set out in writing its findings of fact upon all the material issues of fact presented by the pleadings, together with its conclusions of law thereon, but such findings of fact and conclusions of law shall be separate from the decree, and shall be filed with the clerk and incorporated in and constitute a part of the judgment roll of said cause; and such findings of fact shall have the same force and effect and be equally conclusive as the verdict of a jury in an action at law, except on appeal to the supreme court the cause shall be tried anew without reference to such findings. [L. 1862; D. Sec. 393; L. 1866, p. 12; L. 1870, p. 27; L. 1872, p. 116; L. 1874, p. 94, Sec. 1; L. 1885, p. 69, Sec. 1; L. 1889, p. 139, Sec. 1; H. Sec. 397; L. 1893, p. 26, Sec. 1; B. & C. Sec. 406; O. L. Sec. 405; L. 1925, ch. 80, p. 108; L. 1927, ch. 134, Sec. 1, p. 153; O. C. 1930, Sec. 6–202.]

OREGON COMPILED LAWS, CODE OF CIVIL PROCEDURE, SECTION 10–810

How judgment or decree reviewed: Ground for reversal or modification: Trial anew. Upon an appeal from a judgment, the same shall only be reviewed as to questions of law appearing upon

the transcript, and shall only be reversed or modified for errors substantially affecting the rights of the appellant; but upon an appeal from the judgment of a county court or justice's court, the action shall be tried anew, upon substantially the issues tried in the court below; and upon an appeal from a decree given in any court the suit shall be tried anew upon the transcript and evidence accompanying it. [L. 1862, p. 137; L. 1864; D. Sec. 533; L. 1866, p. 15, Sec. 5; L. 1870, p. 34, Sec. 8; D. & L. Sec. 533; L. 1885, p. 69, Sec. 4; L. 1889, p. 141, Sec. 4; H. Sec. 543; B. & C. Sec. 555; L. O. L. Sec. 556; O. L. Sec. 556; O. C. 1930, Sec. 7–510.]

U. S. GOVERNMENT PRINTING OFFICE: 1947

SUBJECT INDEX

TABLE OF CASES AND STATUTES

Supreme Court of the United States

October Term, 1946

No. 770

THE CITY OF PORTLAND, a municipal corporation,
Petitioner,

v.

PUBLIC MARKET COMPANY OF PORTLAND, RECONSTRUCTION FINANCE CORPORATION, and THE FIRST NATIONAL BANK OF PORTLAND (OREGON),
Respondents.

BRIEF FOR RESPONDENT PUBLIC MARKET COMPANY OF PORTLAND IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

Petitioner's brief adopts, as its Statement of the Case, the "Summary Statement" of the petition. Respondent Market Company believes this statement to be inadequate and inaccurate in many respects and that a further explanation of the case is necessary.

The case has been pending in the Oregon courts since 1935. Its original purpose was to secure specific

performance of a contract obligation of petitioner, the City of Portland, to take and pay for certain real property upon which a public market building had been constructed according to the City's specifications. An accounting was also sought; and following recognized equity practice, the complaint prayed for such other and further relief as might be found appropriate.[1]

The contract involved was entered into October 28, 1931. By its terms Respondent Market Company agreed to build and equip a market building on land belonging to the Company and to organize therein a public market operation, and the City obligated itself to accept the property as so improved and to pay a stated price plus certain additions. The project was financed through a loan made by Respondent Reconstruction Finance Corporation (herein referred to as the "RFC"). The loan was evidenced by a bond issue of which Respondent The First National Bank of Portland (Oregon) (herein referred to as the "Bank") became trustee.

The complaint alleged performance by the Market Company and a tender of the property and a refusal

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[1] Abst. of Rec. 1938 Appeal, 20
(In the references to the record, each appeal to the Oregon Supreme Court is identified by the year in which the appeal was decided.)

by the City to accept it. Respondent RFC and the Bank were unwilling to join in bringing the suit and were therefore made defendants, but in answers thereafter filed they joined the Market Company, and thereafter participated, in seeking the relief prayed for in the complaint.

Petitioner's assertion that the City has not had its day in court requires a careful examination of the steps taken during the long period in which the case has been pending in the Oregon courts. In result, the Supreme Court of Oregon found the City at fault but declined to decree specific performance because the City's plan for financing its purchase of the property had become impracticable if not impossible; and as alternative relief damages were awarded. The course of the litigation may perhaps be more easily followed if the periods terminating with each of the four decisions of the Oregon Supreme Court are reviewed separately.

1935-1938

The City's first defensive move was a demurrer to the complaint. This advanced the contention that the contract did not impose upon the City a general obligation to take and pay for the property, but only an obligation (1) to create, if possible, a fund for

this purpose by attempting to sell to investors an issue of "public market utility" certificates (in effect, revenue bonds based upon operation of the proposed market by the City), and (2) to use such fund when created for the purchase of the market property.

The trial court accepted this view of the contract and sustained the demurrer, taking the position that relief for breach of the contract thus construed was not available, because in the opinion of the court such a special fund contract could not be enforced in equity. This was reversed upon appeal. The majority of the appellate court held that the contract itself, apart from any circumstances which might show a different intent, imposed upon the City a general obligation to purchase the property. The minority disagreed, but nevertheless concurred in the conclusion that the trial court was wrong in sustaining the demurrer, since, as the dissenting opinion pointed out, the Market Company would be entitled to relief if it proved a breach of the special fund obligation; the nature of that relief could be determined, the dissenting opinion said, after the completion of the accounting prayed for. [2]

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[2] Public Mkt. Co. v. City of Portland, 160 Or. 155, 194, 83 Pac. (2d) 440, 456.

1938-1942

Upon the return of the case to the trial court the City answered and the case was thereafter tried. The decision first announced by the trial court held merely that the contract, interpreted in the light of the circumstances shown, did not impose upon the City a general obligation to purchase the property.[3] Upon the Market Company's protest that this did not dispose of the controversy since the Market Company would be entitled to relief for any breach by the City of the obligation to create the special fund required and with it to purchase the property, the issues were reargued and thereafter a supplemental opinion was filed which held that the Market Company had not fully performed on its part; upon this ground the trial court declined to pass upon the question of fault on the part of the City.[4] A judgment of dismissal was thereupon entered.[5] The intimation that the case was dismissed because the Market Company failed to amend its complaint to plead damages for breach of a special fund contract (Petition 12-13) is contrary to the fact. The case was dismissed because of the court's determination that the Market Company

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[3] Abst. of Rec. 1942 Appeal, 152
[4] Abst. of Rec. 1942 Appeal, 173
[5] Abst. of Rec. 1942 Appeal, 192

had not performed on its part and therefore could not complain of nonperformance by the City.[6]

Upon appeal, this ruling was held erroneous. The City had contended that the contract required the Market Company to tender a market in operation and earning a profit. This contention was rejected by the appellate court; the court held that the subject of the contract was not a market business but a physical plant fully organized and prepared for business. The court's conclusion was that the Market Company had fully complied with its obligations under the contract.

The appellate court then reviewed the evidence and found the City guilty of a deliberate and unwarranted repudiation of its obligations under the contract. The court approved the conclusion of the trial court that only a limited, or "special fund" obligation was intended by the contracting parties, and then determined that the remedy of specific performance of the contract thus interpreted was not available. The City's repudiation of the contract, the protracted litigation, and other circumstances made it altogether unlikely that the project could still be financed through the contemplated sale of securities.

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[6] 171 Or. 522, 531, 130 Pac. (2d) 624, 628

The court then undertook to ascertain what alternative relief was available and applied the rule of the local improvement cases, under which municipalities have been held liable ex delicto for the contract cost of an improvement where there had been a failure to levy the assessment or create the fund required for the project. This meant an award of damages equal to the total sum due the Market Company under the contract, but subject to a deduction representing the value of the property left in the hands of the Market Company at the time of the rejection of the tender. The case was remanded to the trial court for an accounting to determine the amount payable under the contract and to ascertain the value of the property at the time of the tender and its rejection; judgment to be entered against the City for the excess, if any, of the former sum over the latter.[7]

It is this decision (in 1942) which, according to the City's contention, denied it due process of law. The later decision, to which the petition for certiorari is addressed, merely approved (subject to a modification upon the valuation question) the trial court's action in giving effect to the 1942 decision. Yet the City did not avail itself of its right to seek a rehearing following the 1942 decision.

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[7] 171 Or. 522, 587-596, 130 Pac. (2d) 624, 649-653

1942-1943

The Market Company and the RFC and the Bank asked for an amplification (through a petition for rehearing) of the 1942 decision to determine whether the award of damages when ascertained should carry interest from the date of the breach of contract, November 14, 1934. The question was briefed and argued and on June 15, 1943, the Supreme Court of Oregon handed down a supplemental decision directing the addition of interest to any award of damages made pursuant to the 1942 decision.[8]

1943-1946

Upon the return of the case to the trial court, the Market Company amended its complaint to state its contention as to the value of the market property at the time of the breach of contract and to add a prayer asking, as alternative relief, for judgment for the total sum due under the contract, less whatever should be found to be the value of the property at the time of the breach.[9]

The City filed an answer to this amended complaint alleging that acts and omissions by the Market Company had prevented the City from offering the con-

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(8) 171 Or. 621, 138 Pac. (2d) 916
(9) Abst. of Rec. 1946 Appeal, 2

templated issue of securities to the investing public and from creating the fund to be used for the purchase of the market property; and the answer asserted that the City had not had an earlier opportunity to make this defense, and that refusal to permit the defense to be made would deny the City equal protection of the law and deprive it of its property without due process of law.[10]

The trial court ruled that this issue had been tried and decided against the City in the earlier stages of the litigation. The court nevertheless permitted the City to introduce evidence in support of its contention, under the local rule[11] designed to make a complete record available (in suits in equity) in the event of an appeal. Witnesses thereupon testified that the proposed security issue would not have been salable, but the trial court held this evidence insufficient to show that the City could not have succeeded in financing the project in the manner contemplated had it made a bona fide and sustained effort to do so.[12]

Judgment was thereupon entered against the City for $791,666.67, made up as follows:[13]

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[10] Abst. of Rec. 1946 Appeal, 54
[11] 2 Oregon Comp. Laws Ann. Sec. 9-202
[12] Appendix to Resp. Br. 1946 Appeal, 191, 227
[13] Abst. of Rec. 1946 Appeal, 110

Total sum due under contract,	$1,463,943.96
Less value of property at time of breach,	963,943.96
Damage award,	$ 500,000.00
Interest from November 14, 1934,	291,666.67
Total award,	$ 791,666.67

The City thereupon appealed. The Market Company, RFC, and Bank cross-appealed upon the ground that the trial court had overvalued the property and had thereby reduced the damage award too greatly. The Supreme Court of Oregon rejected the City's contention, holding that the issue attempted to be raised—whether the City was at fault in failing to attempt performance of its contract obligation, and whether there was any primary or contributory fault on the part of the Market Company—had been fully tried and decided against the City in the earlier proceedings. Upon the cross appeal the court held that the property had been overvalued by the trial court; and $800,000 was adopted as the correct value figure. This increased the damage award to $663,943.96. The trial court was directed to enter judgment for this amount, with interest from November 15, 1934. The interest was later computed at $471,732.11, so that the judgment finally entered is for the sum of

$1,135,676.07. A petition for rehearing thereafter filed by the City was denied without an opinion.[14]

The City's petition to this Court for a writ of certiorari seeking a review of the proceedings and a reversal of this judgment was thereafter filed.

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[14] 170 Pac. (2d) 586

ARGUMENT

Analysis of Petitioner's Contention

Petitioner's contention, briefly stated, is that the question of nonperformance by the City, in failing to take steps to create the fund to be used in the purchase of the market property, was decided against it without giving the City an opportunity to make its defense. The petition and brief attempt to ignore the fact that there had been a fair trial, with the fullest opportunity to defend on all possible grounds, of the question of nonperformance by the City in repudiating any and all obligations under the contract. The resolution adopted by the City Council, rejecting the tender of the property, stated[15] that

> " . . . the City of Portland recognizes no duty upon its part to comply with any terms of any alleged agreement between it and the Public Market Company and particularly with reference to that document dated October 28, 1931, . . . "

The City's attempted justification of this repudiation (in defending the suit) was based on a number of grounds; and the questions presented constituted the principal issues of the trial in the circuit court, and before the state Supreme Court in the 1942 appeal.[16]

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[15] Book of Exhibits, 1942 Appeal, 300
[16] 171 Or. 522, 579-592, 130 Pac. (2d) 624, 646-651

In result, petitioner is contending that the City, although found guilty, after a fair trial, of an unwarranted repudiation of *all* obligations under the contract with the Market Company, is nevertheless entitled to another hearing upon the question whether it was at fault, or "negligent", in failing to perform certain specific obligations necessary to its performance of the contract. Performance by the City, as the contract was finally interpreted by the Oregon Supreme Court, meant simply a good faith effort to finance the project through an issue of securities and the use of the fund thus raised in the purchase of the property. Petitioner seems to argue, first, that a breach of this obligation was not established by the finding that the City had repudiated the entire contract obligation, second, that to establish such a breach it would be necessary to show negligence on the part of the City, and third, that the Supreme Court of Oregon, in the 1942 decision, found the City guilty of such negligence without giving the City an opportunity to meet the charges of negligence or to show contributory negligence on the part of the Market Company.

Petitioner Has Had Its Day in Court Upon the Issue It Now Seeks to Raise

Petitioner's contention that the question of the City's "negligence" in failing to perform its contract

obligation is still open despite the adjudication that the City wrongfully repudiated the entire contract obligation, seems absurd. But the contention is not merely absurd; to imply, as it does, that the City was ready and willing to perform and that performance was prevented by acts or omissions of the Market Company, evades the truth. The City deliberately embarked on a course of repudiation of the contract long before the Market Company tendered the property; and its decision to take this course was not in the slightest degree attributable to anything done or omitted by the Market Company.

This was the conclusion of the Supreme Court of Oregon upon the facts shown by the record. The facts are reviewed at length in its last decision and the conclusion is expressed as follows:[17]

> "The charge now made that it was the conduct of the plaintiff which prevented the issuance and sale of public utility certificates is an afterthought; the truth is that the city's disregard of its duty was the result of its decision that it did not want the market building and did not wish to engage in the market business. We said in our former opinion, in speaking of this very matter, that the city was guilty of 'an outright and unwarranted refusal to be bound by its lawful undertaking.' 171 Or. 590, 130 P. 2d 650.

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[17] 170 Pac. (2d) 586, 592-594

> Not only is that statement the law of the case, but nothing that has been called to our attention since it was made furnishes any ground for thinking that it was not just and correct."

It is difficult to ignore the misrepresentations which are implicit in the statements made to this Court. But if it can be assumed that petitioner's contention here is made in good faith, there is an immediate answer in the fact that the issue now sought to be raised—whether the City was justified in refraining from any effort to create the fund required for the purchase of the market property—was comprehended by and necessarily included within the issue upon which the City was given the fullest opportunity to be heard, viz., whether the City was justified in its repudiation of the contract in its entirety.

Petitioner's argument to the contrary is difficult to follow. Apparently it assumes that the case as originally brought could only give relief to the Market Company if its contention that an obligation to buy the property out of general funds was upheld. Upon this assumption the award of damages for nonperformance of the contract (interpreted as obligating the City to pay for the property out of a special fund to be created) is characterized as a conversion of the case into a tort action based on claims of negligence, with no advance notice to the City that any such issue

was involved.[18] Petitioner is wrong both in its assumption as to the nature of the case as originally brought and in its idea of the meaning of the decision of the Supreme Court of Oregon.

(1) The Market Company sued in equity to enforce the City's obligation to purchase the property. The complaint invoked the equitable powers of the court to grant whatever relief might be found appropriate if, for any reason, specific performance could not be decreed. The prayer for specific performance was equally applicable whether payment under the contract was to be made out of general funds, or out of a special fund to be created; and similarly, the prayer for alternate relief included the remedy of damages for nonperformance, whether simply the failure to pay out of general funds or the failure to take the steps necessary to create the fund required and then to make the payment contracted for.

Petitioner cannot truthfully say that it did not so understand the complaint or that the City had no notice, prior to the 1942 decision of the Oregon Supreme Court, that the case might involve the question of nonperformance through failure to create and make use of a special fund and the remedy available therefor.

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[18] Petition and Brief, 21, 22, 28, 36-37

The first appeal (decided in 1938) challenged a decree of dismissal which reflected the view of the trial court that the contract imposed only a limited, or special fund, obligation upon the City, and that there was no remedy available for a breach of that obligation. The majority of the appellate court disagreed with the trial court's interpretation of the contract. The minority's dissent, although accepting the special fund theory of the contract, agreed with the majority that the order of dismissal was erroneous; the dissenting opinion pointed out that in either case (whether the City had undertaken a general or only a limited obligation), it was the duty of the court, if nonperformance by the City and full performance by the Market Company were shown, to ascertain what relief should be afforded the Market Company.[19]

Again, when the case went back to the trial court and when, after a trial, the court decided that in the circumstances shown the contract was not a general obligation contract, and mistakenly assumed that this disposed of the controversy, the Market Company made it clear that relief was sought for the City's repudiation of its contract, whether interpreted as imposing a general or only a limited obligation. The trial court refused to grant relief for nonperformance

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[19] 160 Or. 155, 194-195, 83 Pac. (2d) 440, 456

of the limited obligation, not because that was outside of or beyond the issues of the case, but because of the trial court's mistaken belief that the Market Company had failed to perform its obligations under the contract and was not entitled to *any* relief.[20]

In its appeal from this ruling (the 1942 appeal), the Market Company pressed its contention that if the City's obligation was limited as claimed, and if specific performance of the limited obligation had become impossible or impracticable, damages should be awarded, and the rule of the local improvement cases, imposing liability ex delicto for the amount that would have been paid had the special fund been raised as contemplated, was invoked.[21]

The City's answering brief, although protesting at one point that the issue of damages was not before the court, at another freely admitted that damages measured by the contract price would be recoverable, under the rule of the local improvement cases, if the City had breached its obligation to create, or attempt in good faith to create, the special fund required for the purchase. The brief said:

"The City's officers had a definite duty to per-

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[20] 171 Or. 522, 531, 130 Pac. (2d) 624, 628

[21] Appellant's Brief, 1942 Appeal, 217-265

form under penalty of suffering a general obligation against the City."[22]

There can be no question, therefore, that the case as brought and as submitted to the Oregon Supreme Court upon the 1942 appeal, was not limited as petitioner now assumes, but included the issue of relief for nonperformance of the obligation to purchase the market property through the creation and use of a special fund.

(2) Petitioner seems to concede that courts of equity have broad power to grant relief other than that specifically prayed for, provided only that it is suited to the case made by the complaint.[23] It need hardly be added that "the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances."[24]

But petitioner apparently denies that damages ex delicto—for breach of contract—can be awarded in equity. According to its brief (page 36), the damages awarded here could be given only in

" . . . a case as in tort based on allegations of

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[22] Respondents' Brief, 1942 Appeal, 521

[23] Petition and Brief, 41

[24] Porter, Admr. v. Warner Holding Co., 90 L. Ed. Adv. Op. 994, 996

> negligent acts on the part of the City proximately resulting in damages to a certain amount to the contractor, and with opportunity for the City to make a defense on denial of such negligence and proximate damage, and show that the damage, if any, sustained by the contractor, was the proximate result of negligence on its part."

Upon this theory it is said repeatedly in the petition and brief that the Supreme Court of Oregon found the City guilty of negligence without giving the City an opportunity to disprove the charges of negligence or to show contributory negligence on the part of the Market Company.[25]

Petitioner does not explain why it is thought that damages for breach of contract can be given only when negligence is alleged and proven; and the petition and brief completely ignore the plain statement of the Oregon Supreme Court, in the decision upon the 1942 appeal, that the liability of the City was predicated not upon negligence, but upon a deliberate and unwarranted repudiation of the contract. The court said:[26]

> "The local improvement cases have been cited and relied on by the Market Company. Counsel for the City, on the argument and at one point in their brief, conceded their applicability,

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[25] Petition and Brief, 21, 22, 28, 36

[26] 171 Or. 590, 130 Pac. (2d) 650

> though at another point in their brief they take a contrary position, because, it is said, the rule of these cases applies only when a municipality is negligent, and there is no evidence of negligence here. But, if the City was not guilty of negligence, it was guilty of something worse—an outright and unwarranted refusal to be bound by its lawful undertaking. Under the broad principle of which the local improvement cases furnish an illustration, negligence is not the touchstone, but the failure, whether intentional or otherwise, to use the diligence which 'the contract itself imports.' *White v. Snell*, supra; 12 Am. Jur., Contracts, 886, Sec. 329; 17 C.J.S. Contracts, 939, Sec. 456d."

As this decision points out, municipalities incur liability ex delicto for what is due under a contract for a public improvement, where there has been a failure to create the special fund required for the project, whether the failure is due to lack of diligence or to a deliberate and intentional refusal to act. The City was held liable here because it had deliberately and intentionally refused to abide by its contract. Petitioner's representation to this Court that the damage award against the City rests on a finding of negligence is contrary to the fact.

The defense which petitioner now says it should be allowed to make in order to show that it was not negligent and that the Market Company was guilty

of contributory negligence, is the same defense offered by the City as its excuse for repudiating all obligation under the contract. At the trial which preceded the 1942 appeal, the City attempted to show that the Market Company had failed, in a number of particulars, to complete the market as required by the contract, and that such failure made performance by the City impossible. This attempt failed. The Supreme Court of Oregon ruled that the Market Company had fully performed on its part; and the nonperformance by the City was attributed to a deliberate abandonment of the project which was planned and carried out without reference to what the Market Company had done or had failed to do in its effort to meet the requirements of the contract.

The petition and brief indicate that precisely the same defense is to be offered upon the issue as proposed by the City, that is, whether the City lacked diligence in its supposed efforts to perform and whether performance was hindered or prevented by acts or omissions of the Market Company.[27] Apparently the evidence relied upon is for the most part that which was submitted at the trial which preceded the 1942 appeal. What is intended by way of additional proof is shown by the testimony offered by the

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[27] Petition and Brief 48, 55

City, and received subject to objection at the last trial, when the amount of the damage award was ascertained by the trial court.[28]

Specifically, the City's proposed defense is (a) that it would have been impossible, at the time of the tender of the property or thereafter, to finance the acquisition of the property through an issue of municipal securities, and (b) that this was not due to any lack of diligent effort toward performance on the part of the City, but was attributable to the Market Company's failure to provide a market which conformed to the requirements of the contract. This was the defense relied upon in the trial which preceded the 1942 appeal. The repudiation of the contract was a matter of record; the City's explanation (made for the first time when it filed its answer after the first appeal) was that the project had failed for reasons for which the City was not responsible and that the proposed security issue had therefore become unsalable. The defense was rejected in toto. The court held that the way to have tested the salability of the securities was to make a good faith effort to sell them,[29] and that if they had in fact become unsalable, it was only because the City Commissioners, by

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[28] Transcript 1946 Appeal, 1091, 1130

[29] 171 Or. 592, 130 Pac. (2d) 651

official as well as unofficial acts and statements, had theretofore made it plain that the City was not going into the public market business.[30]

The City has therefore had its day in court upon the issues it now says were decided against it without a trial. These issues controlled the question of the City's liability for nonperformance of the contract. They involved no claim of lack of diligence in efforts looking toward performance. No such question arose or could arise because the City never undertook performance. The representations now made to this Court misstate the issue upon which the City was held liable to the Market Company and the RFC. The finding that the City deliberately and intentionally refused without justification to perform its contract obligation forecloses any contention that the City was not guilty of negligence with respect to its obligation.

Inadequacy of Proposed Defense

The jurisdictional statement of the petition and the statement of "The Question Presented" seem to indicate that petitioner's complaint is not so much that it was denied an opportunity to present evidence to show due diligence on its part, but rather that it was not given advance notice of this issue, and therefore did

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[30] 170 Pac. (2d) 592

not have a fair opportunity to meet the charge of negligence or to prove fault on the part of the Company.[31]

But if it could be said that the City did not have adequate notice of the issues involved in its repudiation of the contract, the defense now suggested is simply that the Market Company was required to turn over an operation with demonstrated earning capacity, that it did not do so, and that because of this the City refrained from any attempt to offer to investors its proposed issue of securities. We have already pointed out that this defense was urged by the City in the trial of the case and was rejected first, because it misinterpreted the contract, and, second, because it was not borne out by the facts.[32]

At the supplemental trial following the 1942 appeal, when petitioner asserted the right to a trial of the supposed issue of negligence, it was not denied the right to present additional evidence deemed pertinent to this issue. Some additional testimony was offered, going chiefly to the question of the salability of the security issue through which the City was to raise the fund required for the purchase of the

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[31] Petition and Brief, 21-22

[32] 171 Or. 590, 130 Pac. (2d) 650; 170 Pac. (2d) 592, 594

property.[33] This testimony was received subject to objection.

The trial court held that the question of fault on the part of the City, whether the result of negligence or wilful design, was foreclosed by the prior decision of the Oregon Supreme Court, but the court nevertheless expressed the view that petitioner's testimony upon this question failed to prove what was claimed for it. The witnesses testified merely that in the conditions prevailing in November, 1934 (when the property was tendered) and thereafter, the City's proposed security issue could not have been sold successfully. There was no attempt to show what might have been accomplished in this respect if the City's representatives had not theretofore made it perfectly clear to the public that the City would not undertake or give support to the municipal market project, upon the earnings of which the proposed security issue was to depend. The trial court commented upon the City's evidence as follows:[34]

> "There has been no satisfactory showing of any kind that with a bonafide and sustained effort upon the part of the City and all interested the certificates could not have been satisfactorily disposed of within a reasonable time. As a matter

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[33] Transcript 1946 Appeal, 1091, 1130
[34] Appendix to Respondent's Brief 1946 Appeal, 227

of fact, the public market, municipally operated, never had a fair trial. Much is spoken and written with reference to the disastrous experience of municipally owned markets, but the court is convinced of the soundness of Judge Lusk's expression when he says:[35]

'No one can say now, on this record, with any assurance that the market would not have prospered had the City carried out its engagement in good faith. The representations made by the Market Company related to a market to be owned and operated by the City. It would have been practically a monopoly. Had the City's enthusiasm for a municipally owned market continued unabated, had it made a good faith effort to sell the public utility certificates, had it accepted the property and operated the market, for all that anyone can now determine there might have been a different story. The Market Company has been compelled to contend with conditions that were never contemplated and for which it is not responsible. Competition has come from another public market a few blocks distant; while, as the record discloses, the City's attitude and the uncertainty in the minds of tenants and prospective tenants as to whether the City would take over the market injured the business in its very beginning. The unfortunate experience of the Market Company is not to be taken as a criterion of what the City might have accomplished. Municipal ownership and operation have never been tried; had they been, the

[35] 171 Or. 586, 130 Pac. (2d) 649

> faith of the promoters of the enterprise would, perhaps, have been vindicated. We think that the charge, or intimation of fraudulent conduct on the part of the Market Company is baseless and without foundation.' "

Upon the City's appeal from this decision (the 1946 appeal), the Supreme Court reviewed at length the evidence which led to the conclusion quoted by the trial court from the 1942 decision. The court then said:[36]

> "We said in our former opinion, in speaking of this very matter, that the city was guilty of 'an outright and unwarranted refusal to be bound by its lawful undertaking.' 171 Or. 590, 130 P. 2d 650. Not only is that statement the law of the case, but nothing that has been called to our attention since it was made furnishes any ground for thinking that it was not just and correct."

It appears, therefore, that while the Oregon courts have not been willing to accept petitioner's contention that proof of negligence is essential to liability for nonperformance, the evidence relied upon by petitioner to show lack of negligence has been examined and found inadequate. Of course petitioner could not establish that it made diligent efforts to create the fund required for performance. Petitioner's conten-

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[36] 170 Pac. (2d) 494

tion that there is an issue upon which it has not been heard is frivolous.

Two additional considerations indicate that this characterization of petitioner's contention is fully warranted:

(1) *Due Process Claim an Afterthought*

The City accepted without protest the 1942 decision of the Oregon Supreme Court which is now said to have converted the case into a negligence action and to have decided the negligence issue without giving the City a chance to be heard. This decision was announced on November 2, 1942. The City did not seek a rehearing nor did it suggest that its constitutional rights had been invaded. Ample opportunity was afforded for any such suggestion since the case was not at once remanded but remained before the court for more than seven months after the announcement of the decision.

The Market Company and the RFC and Bank asked for and secured a rehearing to determine whether the damages to be awarded should include interest from the date of the City's default. Briefs and oral argument were called for and as a result the 1942 decision did not become final until June 15, 1943, when the

court amplified it by passing upon the interest question.[37]

The City had contended in the 1942 appeal that the question of damages for nonperformance of the obligation to create the special fund was not properly before the court (although the question was in fact argued in the City's brief), but it was not suggested that the court could not consider the question without a denial of rights under the Constitution of the United States.[38]

The due process contention was first advanced in an answer filed by the City when the case was remanded to the trial court.[39] It is obviously an afterthought evolved in the hope of finding some way to retry the issues decided against the City.

(2) *Each Question Presented has already been Tried*

We have already pointed out that petitioner's defense, if it is entitled to a trial upon the charge that it was *negligent* in not putting forth efforts to create the fund required for the performance of the contract, is that the Market Company was obligated to provide an operating public market which would

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(37) 171 Or. 586, 130 Pac. (2d) 649
(38) Respondent's Brief 1942 Appeal, 555-576
(39) Abst. of Rec. 1946 Appeal, 49, 65, 68

support the security issue contemplated by the City, that it failed to do this, and that the City did not go ahead because of this failure on the part of the Market Company.

Each of the questions which would be presented by this defense has already been fully and fairly tried. The specification of errors in petitioner's brief (pages 28-32) makes this perfectly clear. It is said that the "overall" error is the conversion of the case into a negligence action, but the brief explains that this general error was the result of twenty-two particular errors which are then stated. The errors thus catalogued (other than those challenging the conclusion and invoking the supposed Federal right) are all alleged mistakes in the 1942 decision upon the questions of contract performance presented by the record and properly before the court for disposition.

No. 1, for example, is that the court erred "in holding that the Company had fully performed on its part"; and Nos. 18 and 19 assign error in the ruling that performance by the City was not prevented by the Company. Nos. 2, 19, 20 and 21 complain of the ruling that the Company made an adequate tender of the property, and that the City wrongfully repudiated the contract. Nos. 3 and 6 challenge the rule

of damages applied (the rule of the local improvement cases), and No. 5 criticizes the 1943 decision, allowing interest from the date of the breach.

The basic contention advanced by petitioner throughout the protracted litigation, and now urged upon this Court, is that the Market Company made performance of the contract impossible. The brief says (page 48) that the Company "destroyed the salability of the securities which were to be offered investors by the City." This contention, though fully and fairly tried, and decided adversely to petitioner, is the essence of the claim of error made to this Court.

Thus in result petitioner is seeking to retry the questions which were decided against it after a trial. The reason given for this request is that the Market Company was not demanding, in the trial in which the questions were decided, the kind of relief that was ultimately given. We have already pointed out that the Market Company was demanding, from the inception of the case, complete relief because of the City's unwarranted refusal to abide by its contract.

It need only be added that the City joined in presenting to the Oregon Supreme Court, in the 1942 appeal, the precise question of relief for nonperformance of the obligation to create the special fund required for the purchase of the market property. At

one point in its brief the City admitted that failure to take steps to create the special fund would impose a general obligation upon the City for the cost of the project; elsewhere in the brief it was argued that this question was not within the issues made by the pleadings. But after stating and arguing this contention, the brief undertook to meet the issue, advancing the same arguments against an award of damages for nonperformance of the special fund requirement that appear in the petition and brief addressed to this Court—the arguments that petitioner would have this Court believe it has never had an opportunity to make.[40]

Respondent Market Company respectfully submits that petitioner has had its day in court upon the questions raised and that the petition for certiorari should be denied.

CHARLES A. HART
PRESCOTT W. COOKINGHAM
Counsel for Respondent Public Market Company of Portland

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[40] Respondent's Brief 1942 Appeal, 521, 555-576